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No. 194 MISC.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT HUBBARD and LAVINIA HUBBARD, His Wife,
Movants,

versus

HENRY L. BROOKS, U. S. District Judge for Western District of Kentucky, Federal Building, Louisville (1), Kentucky,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

TO HONORABLE SUPREME COURT OF THE UNITED STATES.

ROBERT HUBBARD,
LAVINIA HUBBARD,
Movants.

IN THE

Supreme Court of the United States

ROBERT HUBBARD, and
LAVINIA HUBBARD, his wife, - - - *Petitioners,*

v.

HON. HENRY L. BROOKS, United States District Judge for the Western District of Kentucky, - - - - *Respondent.*

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IN THE

Supreme Court of the United States

Term 1957, No.

ROBERT HUBBARD and
LAVINIA HUBBARD, His Wife,
Movants,

v.

HENRY L. BROOKS,
U. S. District Judge for
Western District of
Kentucky,
Federal Building,
Louisville 1, Kentucky,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

TO HONORABLE SUPREME COURT OF THE UNITED STATES.

Come Robert Hubbard and Lavinia Hubbard, his wife, in person,

> "APPEARANCE PERSONAL OR BY COUNSEL. In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." (28 USC, Section 1654, Page 4211, 1952 Edition.)

and under

> "1. The petition in any proceeding seeking the issuance of a writ by this court authorized by

> 28 U.S.C. § 1651(a) or 28 U.S.C. § 2241 shall be prefaced by a motion for leave to file such petition * * *." (Rule 31 (1) and (3) of the Supreme Court.)

and respectfully move the Court for leave to file a Petition for a Writ of Mandamus under

> "WRITS. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law." (USC Section 1651 (a), Page 4210, 1952 Edition.)

against Honorable Henry L. Brooks, Respondent, U. S. District Judge for the Western District of Kentucky, and to direct and order said Respondent to revoke his Orders of July 3 and July 22, 1957 (certified copies of which Orders are appended to their Petition) and to convene a three-judge Court,

> "INJUNCTION AGAINST ENFORCEMENT OF FEDERAL STATUTE: THREE-JUDGE COURT REQUIRED.
>
> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any District Court or judge thereof unless the application thereof is heard and determined by a district court of three judges under Section 2284 of this title." (28 USC Section 2282, Page 4410—1952 Edition.)

and

"THREE-JUDGE DISTRICT COURT; COMPOSITION: PRECDURE. In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding. * * *

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application. * * *" (28 USC, Section 2284, Page 4411, 1952 Edition.)

to determine the constitutional question

"NO PERSON SHALL * * * BE DEPRIVED * * * OF PROPERTY, WITHOUT DUE PROCESS OF LAW."

under the Fifth Amendment of the Constitution of the United States raised in Movants' Third Amended Complaint and Amendment to Third Amended Complaint in Action No. 3216 in the United States District Court for the Western District of Kentucky, styled: Robert Hubbard and Lavinia Hubbard, his wife, against William M. Gray, District Director of In-

ternal Revenue, Louisville, Kentucky, and the United States of America (See Ex Parte—In the Matter of the Metropolitan Water Company of West Va., Petitioner, 220 U. S. 539, 31 S. Ct. 600, 55 L. Ed. 575; Mosher v. City of Phoenix, 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148; Ex Parte Cogdell, *et al.*, 342 U. S. 163, 72 S. Ct. 196, 96 L. Ed. 181); so that the Plaintiffs, or Defendants, in the aforesaid Action No. 3216, may appeal direct to this Court under

> "DIRECT APPEALS FROM DECISIONS OF THREE-JUDGE COURTS.
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges." (See 28 USC, Section 1253, Page 4181—1952 Edition);

and Movants most earnestly and respectfully request this Honorable Court to carefully read and consider their Petition (not withstanding it is possibly very long) and to grant this Motion and to grant their Petition.

ROBERT HUBBARD
LAVINIA HUBBARD
Movants.

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TO HONORABLE SUPREME COURT OF THE UNITED STATES.

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LAVINIA HUBBARD,
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IN THE

Supreme Court of the United States

Term 1957, No. ———

ROBERT HUBBARD, and
LAVINIA HUBBARD, his wife,
Petitioners,

v.

HON. HENRY L. BROOKS,
U. S. District Judge for
Western District of
Kentucky,
Federal Building,
Louisville (1), Kentucky,
Respondent.

PETITION FOR WRIT OF MANDAMUS.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petition of Robert Hubbard, and Lavinia Hubbard, his wife, respectfully asks for a Writ of Mandamus directed to the respondent, Hon. Henry L. Brooks, U. S. District Judge for the Western District of Kentucky, the Court in which the Action hereinafter mentioned originated, and for their Petition they state as follows:

1. RULES OF THIS COURT. Reference herein to the Rules of the Court will be made, thus; R. No. ——. With slight variations we have, in this our Petition, sincerely endeavored to literally meet the Rules of this HONORABLE COURT—Nos. 9, 23,

32(3), 33 and 39—and we have especially and diligently tried *"to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration"*. R. 23 (4). *And yet, if perchance we have failed in some, or any, especially in length hereof, respects to fully comply with the Rules of this Honorable Court, still, we most sincerely and respectfully request the Court not only to carefully read, especially Paragraph 9 D, pages 21-52, and consider our Petition, but to grant and sustain it.*

2. PARTIES. Petitioners, Robert Hubbard and Lavinia Hubbard, his wife, are citizens and residents of Louisville, (5) Jefferson County, State of Kentucky, United States of America. Honorable Henry L. Brooks, Respondent, Federal Building, Louisville, (1) Jefferson County, Kentucky, United States of America is a duly appointed, qualified and acting United States District Judge for the Western District of Kentucky. William M. Gray, District Director of Internal Revenue for the District of Kentucky, and the United States of America, were Parties Defendant in Respondent's Court, in Action No. 3216, hereinabove mentioned in petitioners' Motion.

3. JUDGE HENRY L. BROOKS, RESPONDENT'S ERRONEOUS AND PREJUDICIAL REFUSAL TO CONVENE A THREE-JUDGE COURT. Your petitioner, Robert Hubbard, has been personally acquainted with Judge Brooks for at least twenty-five years, possibly longer. I am happy to consider him a friend. We consider him a gentleman in the

real sense of that term, and honorable man. Without any hesitation whatsoever we unequivocally state that we believe him to be an able, capable, honest, intelligent, upright, just and impartial Judge. But notwithstanding our high personal esteem and respect for the respondent, we are most firmly convinced that he has prejudically and reversibly erred in that he has arbitrarily refused to convene a three-judge Court.

"INJUNCTION AGAINST ENFORCEMENT OF FEDERAL STATUTE; THREE-JUDGE COURT REQUIRED.

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any District Court or judge thereof unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title". (1952 Edition, 28 USC, Sections 2282, page 4410.)

and

"THREE-JUDGE DISTRICT COURT; COMPOSITION; PROCEDURE.

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall

designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding. * * *

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application." * * * (1952 Edition, 28 USC Section 2284, page 4411.)

(See Metropolitan Water Co. of W. Va., 220 U. S. 539, 31 S. Ct. 600, 55 L. Ed. 575; Mosher v. City of Phoenix, 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148; Cogdell, *et al.*, 342 U. S. 163, 72 S. Ct. 196, 96 L. Ed. 181, cited in our Motion), to consider whether or not portions (which we shall hereinafter set forth) of 26 USC, Section 294 (d)(1) (A)(B), page 3461, Second Edition, are contrary to the due process clause,

"NO PERSON SHALL * * * BE DEPRIVED * * * OF PROPERTY, WITHOUT DUE PROCESS OF LAW,"

of the Fifth Amendment to the Constitution of the United States of America. Under subsequent Paragraphs pp. 5-56 we have set forth our reasons, argument and law to support this our contention.

4. R. 23-1 (a)(b) i, ii, iii GROUNDS FOR JURISDICTION, ORDERS—MOTION. The refusal of the respondent to convene a three-judge court, under 28 USC, Section 2284 quoted in Paragraph Three above, in Action No. 3216, pending before him, is the ground upon which this Court's jurisdiction is

invoked, because petitioners had definitely, by their Third Amended Complaint and the Amendment to it, raised a question as to the constitutionality, under the due process clause, hereinabove quoted in Paragraph Three, of the Fifth Amendment to the Constitution of the United States, of certain portions of 26 USC, Section 294, hereinafter quoted in Paragraph Six, under and by which William M. Gray, defendant in said action, assessed, *without any notice or hearing whatsoever, (due process) income tax penalties (not deficiency taxes) against your petitioners.* A certified copy of the Order, dated July 3, 1957, of the respondent overruling your petitioner's request and prayer for a three-judge court is appended hereto, pages 94-97, as Exhibit J. A certified copy of petitioners' Motion of July 12, 1957, for a new trial or to set aside said Order, is appended hereto, pages 97-101, as Exhibit "K". A certified copy of respondent's Order overruling this Motion is appended hereto as Exhibit "L", pages 102-103.

"WRITS

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (28 USC, Section 1651 (a) page 4210—1952 Edition.)

Is the statutory provision believed to confer jurisdiction on this Court to review the Orders hereinabove mentioned of the Respondent. See Metropolitan

Water Co., W. Va., *supra;* Mosher v. City of Phoenix, *supra;* Ex Parte Cogdell, *et al., supra,* page 4.

5. RULE 23(c) QUESTIONS PRESENTED FOR REVIEW. Two questions are presented for review—the first and most important one, is the refusal, as hereinabove pointed out in Paragraphs Three and Four, of the respondent to convene a three-judge court to determine the constitutional question raised by petitioners' pleadings in Action No. 3216 then pending before him. The second question presented for review is the refusal of the respondent to enjoin the defendants in said Action pending before him from collecting INCOME TAX PENALTIES (NOT DEFICIENCY TAXES) ASSESSED BY SAID DEFENDANT WITHOUT NOTICE OR HEARING TO THESE PETITIONERS.

6. RULE 23(d). THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. "NO PERSON SHALL * * * BE DEPRIVED * * * OF PROPERTY, WITHOUT DUE PROCESS OF LAW," Etc. Fifth Amendment to the Constitution of the United States is involved.

Sections of the Internal Revenue Code in force during 1953 and 1954, pertinent to the issues involved in this Petition, are in part as follows:

"Sec. 58 DECLARATION OF ESTIMATED TAX BY INDIVIDUALS

"(a) Requirement of declaration. Every individual other than an estate or trust and (other than a non-resident alien with respect to whose

wages, as defined in section 1621 (a), withholding under Subchapter D of Chapter 9 is not made applicable) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax * * *

"(d) TIME AND PLACE FOR FILING.

"(1) In General. The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58 (a) are first met

"(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

"(B) after June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year, or

"(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year". (USC 26, Section 58 (a) and (d)(1) (A), (B), (C) and (D).)

Petitioners contend that the parts of 26 USC, Section 294 (d)(1) (A) and (B), pages 269 and 270, Second Edition, herein quoted verbatim, are contrary to the Fifth Amendment of the Constiution and void:

"294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT. * * * (d) Estimated tax

"(1) Failure to file declaration or pay installment of estimated tax.

"'(A) Failure to file declaration. In the case of a failure to make and file a declaration of estimated tax within the time prescribed, *unless such*

failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

"(B) Failure to pay installments of estimated tax declared. Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the *Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect,* in the case of a failure to pay an installment of the estimated tax within the time prescribed, *unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect,* there shall be added to the *tax* 5 per centum of the unpaid amount of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which

such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment."

under which the collector ASSESSED WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD INCOME TAX (NOT DEFICIENCY TAXES) PENALTIES AGAINST YOUR PETITIONERS IS UNCONSTITUTIONAL AND CONTRARY BOTH TO THE LETTER AND SPIRIT OF THE PROVISION OF THE FIFTH AMENDMENT ABOVE QUOTED.

7. R. 23(e)—A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS ARE PRESENTED. On January 15, 1954 petitioners filed their joint Federal Income Tax Return for the year 1953 (see Exhibit "B"—Complaint, Appendix, pages 69-72) but were unable, at that time, to pay the full tax. They did, however, shortly thereafter pay it in full. On April 26, 1955 (see Exhibit "A" (1)—Stipulation, Appendix, pages 57-62), the District Director for Kentucky, William M. Gray, *without any notice whatsoever to petitioners or without any opportunity to be heard, assessed penalties (not deficiency taxes) against these petitioners* under 26 USC 294 (d)(1)(A)(B) hereinabove quoted. Again on May 16, 1955 (see Exhibit "A" (4)—Stipulation, Appendix, pages 63-68), the District Director, William M. Gray, increased the penalties assessed.

The first line of page 1 of the District Director's Notice of April 26, 1955 (see Exhibit "A" 1 above) reads as follows:

> "The enclosed report, which has been prepared after careful consideration of available information"

is absolutely untrue, because your petitioners' books, records, and financial statements, were at all times open to the inspection of any tax examiner under the District Director, William M. Gray. Hence, there was available for them all the information that we possess of our own records. Furthermore, had we not been willing to produce said records the Director could have compelled their production (26 USC, Sections 7602, 7603, and 7604). The same language occurs in the District Director's communication of May 16, 1955 (see Exhibit "A"—4 above). Certainly, between April 26, 1955 and May 16, 1955, there must have been some duty upon the part of the Director to call upon these petitioners to produce their books, records and financial statements for examination to ascertain whether or not reasonable cause existed for any failure, if any there was, on their part, to file estimated tax returns or whether such failure, if any, was due to willful neglect and/or to pay in full the tax reported on January 15, 1954. *But no, the Director arbitrarily, without any "careful consideration of available information" imposed penalties.*

The second thing to which we desire to call the Court's attention, in the communications of the Director, is that the assessment is for penalties, and penal-

ties only and not for taxes or a deficiency tax. And, from April 25, 1955 to May 16, 1955, the Director increased the penalty from $119.79 to $231.57.

Some conferences occurred between your petitioners and deputies of William M. Gray and quite a bit of correspondence. Your petitioners, firmly believing that they were right, informed the Director and/or his deputies that they would not pay these penalties but would contest them in court (see Exhibit "B"—Complaint, pages 69-72). On September 26, 1956 the District Director levied on petitioner's, Robert Hubbard's, bank account in the Citizens Fidelity Bank and Trust Company, Louisville 2, Kentucky. Thereupon, petitioners on September 28, 1956 in the United States District Court for the Western District of Kentucky (see Exhibit "B" hereinabove mentioned) filed Complaint against the Director, William M. Gray, *et al.*, to enjoin and restrain him from collecting said penalties and to compel him to release the levy of your petitioner's bank account. Thereupon, on October 15, 1956, the Director, *et al.*, filed his Motion to Dismiss (see Exhibit "C"—Motion to Dismiss, Appendix, pages 74-76).

On December 6, 1956, your petitioners filed an Amended Complaint (see Exhibit "D"—Amended Complaint—Appendix, pages 78-80). On December 6, 1956, a hearing was had before the respondent.

On December 17, 1956, petitioners filed a Second Amended Complaint making the United States Government a party defendant (see Exhibit "E," Second Amended Complaint less Exhibits "A" and "B" re-

ferred to in said Second Amended Complaint, Appendix, pages 81-83).

On December 27, 1956 defendants filed a Motion to Dismiss Second Amended Complaint (see Exhibit "F" —Motion to Dismiss Second Amended Complaint, Appendix, pages 84-86).

On January 24, 1957 your petitioners filed a Third Amended Complaint wherein they alleged that 28 USC Section 294 (d)(1)(A) and (B) hereinabove set out in Paragraph Six, pages 7-9 were unconstitutional and contrary to the due process clause of the Fifth Amendment of the Constitution of the United States (see Exhibit "G" less EXHIBITS "A", "B", and "C" therein referred to, Appendix, pages 87-89).

On February 6, 1957, the petitioners filed Amendment to Prayer of Third Amended Complaint requesting a three-judge court (see Exhibit "H," Appendix, pages 90-91).

On February 15, 1957, defendants filed their Motion to Dismiss the Third Amended Complaint (see Exhibit "I", Appendix, pages 92-93).

On July 3, 1957, the respondent entered an Order sustaining defendant's Motion to Dismiss the petitioners' Complaints and Amended Complaints, wherein he refused and declined to convene a three-judge court to consider the constitutional question raised by your petitioners (see Exhibit "J," Appendix, pages 94-96).

On July 12, 1957, your petitioners filed a Motion, Rule 59(a)(e), to vacate and set aside and/or alter

or amend the Order or Judgment of July 3, 1957 (see Exhibit "K," Appendix, pages 97-101).

On July 22, 1957, the respondent overruled petitioners' Motion of July 12, 1957 (see Exhibit "L," Appendix, pages 102-103).

In Paragraph Numbered 3 of our original Complaint (see Exhibit "B," Appendix, page 70) we set forth our personal situation and alleged:

(1) That the District Director, William M. Gray, *without first ascertaining whether or not these petitioners' failure, if any there was, to strictly comply with 26 USC, Section 58, was due to reasonable cause and not to willful neglect, assessed penalties against these plaintiffs.*

(2) That these petitioners acted in the utmost good faith in filing their income tax return for the year 1953 and in paying said tax.

(3) *That we informed the Commissioner after many conferences that we would resist the collection of said penalties in the District Court.*

In Paragraph Numbered 4 of said Complaint, your petitioners alleged that they would suffer injuries and damage for which there was no adequate remedy at law. In Paragraph Numbered 5 of said Complaint, your petitioners alleged that the failure of the District Director for ten years to enforce the imposition of penalties for failure to make estimated returns constituted a waiver. In their Amended Complaint (see Exhibit "E," Appendix, pages 81-82) your petitioners alleged that the District Director and his rep-

resentatives *"illegally, contrary to Section 294(d), (1) (A), and (B), arbitrarily without any notice whatsoever, and without giving these plaintiffs an opportunity to be heard, and without any competent, or any, evidence, assessed against these plaintiffs the alleged penalties involved."*

In their Third Amended Complaint (see Exhibit "G," Appendix, pages 87-89) they alleged that 26 USC, Section 294, *supra*, is unconstitutional.

8. RULE 23(g). BASIS OF FEDERAL JURISDICTION IN THE DISTRICT COURT. The basis of the United States District Court's jurisdiction in the first instance is embodied in 28 USC, Section 1651(a) hereinabove quoted, page 5 under Paragraph 4.

9. RULE 23(h). A DIRECT AND CONCISE ARGUMENT APPLYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT. Our reasons and argument for sustaining our Motion and Petition may contain matter that at first blush has no direct bearing on the question involved, and it may not be as brief and concise as the RULES of this Honorable Court contemplate, BUT WE TRUST AND ARE FULLY PERSUADED THAT THIS HONORABLE COURT WILL PATIENTLY INDULGE US IN OUR ARGUMENT.

A. WHY WE BYPASS THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS.

Under R 31(3) we find this language:

> "If the petition seeks issuance * * * of a writ * * * of mandamus * * * it shall set forth with particularity why the relief sought is not available in any other court," etc.

We think that the first and foremost duty of any litigant before any Court—from that of a justice of the peace all the way up to this, the most august and greatest Court in the world—is to be truthful, frank, honest, and open in prosecuting or defending any cause that they may have before or in any court. So, in response to the above-quoted portion of R 31(3) we very candidly state to the Court that we have two personal reasons for coming direct to this Court. The first personal reason is financial—pure and simple. We frankly admit that, personally as a matter of business, or of dollars and cents, we can ill-afford to make the fight that we are making. Hence, we do not want to be put to the expense of going through the Sixth Circuit and then making another attempt in this Court. It is even a very great strain financially for these petitioners to put up this fight, but we feel so keenly that we are right that we are willing to make the sacrifice that we are making.

The second personal reason is that we wish to avoid all delay possible.

> "For who shall bear * * * the law's delay, the insolence of office." (Hamlet's Soliloquy, Act III, Scene 1, Shakespeare.)

Your petitioners have passed their 68th milestone, and while each of us are personally in a good state of health, yet we are far towards the sunset of life, and we would like as little delay in the decision of the issues raised as can possibly be.

In addition to the personal reasons hereinabove stated we earnestly insist that we have a legal right to come direct to this Court. The learned and able respondent, Judge Brooks, has denied us a three-judge Court under 28 USC, Section 2284, *supra,* page 3, Paragraph 3. Had a three-judge court been convened, we would have had a right to have appealed direct to this Court, under,

> "DIRECT APPEALS FROM DECISIONS OF THREE-JUDGE COURTS.
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an Order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges." (28 USC, Section 1253, page 4181—1952 Edition.)

In *Ex Parte* Republic of Peru, 318 U. S. 578, 63 S. Ct. 793, 87 L. Ed. 1014, this Court, speaking through the late Chief Justice Harlan F. Stone, at pages 797 and 798 S. Ct., said:

> "After a full review of the traditional use of the common-law writs by this Court, and in issuing a Writ of Mandamus, in aid of its appellate jurisdiction, to compel a district judge to issue a bench

warrant in conformity to statutory requirements, this Court declared in Ex parte United States, 287 U. S. 241, 248, 249, 53 S. Ct. 129, 131, 77 L. ed. 283:

'The rule deducible from the later decisions, and which we now affirm, is that this Court has full power in its discretion to issue the Writ of Mandamus to a federal district court, ALTHOUGH THE CASE BE ONE IN RESPECT OF WHICH DIRECT APPELLATE JURISDICTION IS VESTED IN THE CIRCUIT COURT OF APPEALS—this court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised *only where a question of public importance is involved,* or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this court as the court of ultimate review only in such exceptional cases.'

"We conclude that we have jurisdiction to issue the writ as prayed."

CAN THERE BE ANY QUESTION OF GREATER PUBLIC IMPORTANCE TO THE AMERICAN PEOPLE THAN THE ANCIENT INALIENABLE CIVIL CONSTITUTIONAL RIGHT NOT TO BE DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW EVEN THOUGH IT IS IN THE COLLECTION OF INCOME TAXES. Certainly, we believe that this Court was correct in holding that a friendly republic

should not be put to the expense and delay of proceeding through the intermediate Circuit Court of Appeals, but the question which your petitioners raise directly affects every income taxpayer in the United States. There are, doubtless, some seventy-five to one hundred million of us. WHILE WE REALIZE THAT IT IS ENTIRELY DISRETIONARY WITH THIS COURT AS TO WHETHER OR NOT THIS COURT WILL GRANT OUR MOTION AND OUR PETITION, STILL WE MOST RESPECTFULLY AND EARNESTLY INSIST THAT THIS QUESTION WHICH WE HAVE RAISED IS OF SUCH GREAT AND VITAL IMPORTANCE TO THE CIVIL RIGHTS (WE SHALL HAVE SOME FURTHER REMARKS ON THE QUESTION OF CIVIL RIGHTS) OF EVERY TAXPAYING AMERICAN CITIZEN, THAT THIS HONORABLE COURT SHOULD NOT ONLY TAKE COGNIZANCE OF THE QUESTION RAISED, BUT SHOULD DECIDE IT FAVORABLY TO THE TAXPAYING PUBLIC AND YOUR PETITIONERS.

B. PERSONAL POSITION. Further indulging the patience of this Honorable Court, I wish to state my personal reasons for making this fight. I was a soldier in the Infantry in the first World War. I was on the Front a month in Belgium before the Armistice was signed. I was in a little—just a little, actual fighting. I thought then, and still think now, that I was fighting for freedom and our inalienable

civil rights as we understand them under our Constitution. I was not drafted—I volunteered. I did not do anything spectacular or become a hero, but I did my duty willingly and cheerfully.

We are not seeking to be martyrs, nor are we striving to be heroes in this fight; neither are we seeking fame, publicity, honor, glory, or riches. We are not seeking favor or mercy. But we are firmly convinced that we are right and that this cause is even greater than the cause fought for in World War I. *Therefore, in the words of Lincoln, "with malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in"* (Lincoln's Second Inaugural Address). *We boldly, but very respectfully, petition this Honorable Court to review the questions mentioned in Paragraph 5 above and with all the zeal, all the courage, all the strength, all the earnestness and determination, and all the ability that a just and Holy God has endowed us with, we fight on for what we firmly believe to be right and we are doing this at a great personal sacrifice to ourselves.*

In the writer's personal experience in the practice of law within the last few years he has had occasion to be employed by others in similar situations, but he could not afford to accept employment because the prospective clients could not possibly pay a fee commensurate with the services required. I have had numerous other instances brought to my attention of similar cases. There are, doubtless, hundreds of thousands of taxpayers upon whom the collectors of in-

ternal revenue have imposed penalties (*not deficiency taxes*) where they could not afford to employ a lawyer to right the wrong imposed upon them. If some client employed me to do the work I have done, and am doing, on this case, I could not afford to do it for him for a fee of less than $3,000.00, or more.

I am sending along with this Motion, but under separate cover and separately addressed to the Members of this Court, a pamphlet which I wrote some eleven years ago, entitled "Proposed World Constitution and Comments." So far as this Motion and Petition are concerned, it has no bearing, except possibly that it may show the Court that the writer has some knowledge of the Constitution, constitutional law, and the background of our civil rights therein contained.

If we, the petitioners, were the only ones affected by the District Director's action in assessing penalties (*not deficiency taxes*) and distraining for them, we would have submitted and paid them before there was any distraint rather than be at the expense and arduous work of fighting the collection of said penalties through the courts; and, we are making a personal sacrifice, very great to us, in this fight. BUT, WE FIRMLY BELIEVE THAT WE ARE FIGHTING FOR EVERY TAXPAYER AND A GREAT PRINCIPLE OF CIVIL RIGHTS AND, THEREFORE, MAKE THE SACRIFICE.

C. CIVIL RIGHTS. There have, doubtless, been within the past several months millions and millions

of words written and spoken about civil rights. But, I cannot conceive of a more fundamental *civil right that the citizens of this great Country enjoy than that they shall not be deprived of their property without due process of law. And, we firmly believe that we can, and will, hereinafter show that the sections of the Internal Revenue Code 26 USC 294(d)(1)(A), and (B), pertaining to the assessment, without notice or opportunity to be heard (due process), of penalties entrusted to the discretion, caprice or whim of a ministerial officer, that is, a collector of internal revenue, is not only literally but contrary to the very spirit of the Fifth Amendment to the Constitution of the United States.*

D. QUESTIONS PRESENTED FOR REVIEW PARAGRAPH 5, PAGE 6 ABOVE—LAW AND ARGUMENT.

(1) OBSERVATIONS.

Before discussing the two questions presented for review in Paragraph 5, page 6 above, we wish to make some observations which we deem pertinent. Since this controversy arose in April, 1955, between your petitioners and the District Director, William M. Gray, of Internal Revenue, we have made a careful, not exhaustive, study of many sections of the United States Internal Revenue Code, especially those pertaining to income taxes, and read and studied many opinions of the Federal—District, Circuit and Supreme—courts on federal income tax cases. From this

experience and study, I have observed that (1) our federal income tax laws are so complicated and complex as to be really very confusing; (2) that the burden of disproving a tax claim or penalty asserted by the Revenue Department is placed upon the taxpayer. This is contrary to all Anglo-Saxon jurisprudence. If the Government makes a claim for income taxes, or any taxes for that matter, or for penalties, the burden should be upon the Government to establish its claim, and not upon the taxpayer to disprove it. If any individual, corporation, association or partnership has a claim against any one else, the burden is upon the person asserting the claim to establish it. *In the writer's opinion, this is a dangerous trend which leads to more and more autocratic power in the hands of ministerial officers of the Internal Revenue Department.* This Court in a recent case, decided December 10, 1956, Walker v. Hutcherson, 77 S. Ct. 200-203, said:

> "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard."

Neither is there anything particularly peculiar about income tax claims of the Government against its citizens that should, contrary to all Anglo-Saxon jurisprudence, and contrary to all other procedure in this Country, both State and Federal courts, place the burden of proof upon the citizen in any tax or penalty claim that the Government might have against said citizen.

The third observation which I wish to make is that the income tax laws, in my opinion, in many instances, grant autocratic and arbitrary powers to the ministerial officers, collectors of internal revenue, that are diametrically contrary to the due process clauses of our Constitution. I do not say this lightly, but, in my opinion, it is a trend very dangerous to the welfare, peace and happiness of our country.

A FOURTH OBSERVATION—MAINTENANCE OF GOVERNMENT—TAXES A NECESSITY.

None of us would care to live in a barbarous state or without a duly organized and constituted civil government. Petitioners clearly recognize and realize the necessity of taxation to maintain civil government. We understand, too, the absolute necessity of granting to the Government the power and authority not only to levy, but also to enforce the collection of taxes, even by distraint if necessary. We realize also that the Government has the power and authority to impose, within constitutional limits, and fix penalties for nonpayment of taxes when due, or for the failure to file estimates of income taxes.

> "The income tax is just. It simply intends to put the burdens of government justly upon the backs of the people. I am in favor of an income tax. When I find a man who is not willing to bear his share of the burdens of the government which protects him, I find a man who is unworthy to enjoy the blessings of a government like ours." (William J. Bryan, "Cross of Gold," 1896.)

We concur in what Mr. Bryan said, *but we most stoutly maintain that it is a clear violation of that part of the Fifth Amendment* ("* * * *nor be deprived* * * * *of property, without due process of law*") *of the Constitution for Congress to delegate to ministerial officers, collectors of internal revenue and their subordinate employees, the power and authority to impose penalties and distrain for their collection at his or their own caprice or whim, without due process of law, that is, without notice or an opportunity to be heard before such penalties are imposed or distraint for their collection is issued.*

(2) SECOND QUESTION PRESENTED FOR REVIEW. The second question presented for review is: Does the District Court have the power and authority under 28 USC, Section 1651(a), quoted above, page 5, to enjoin the assessment and collection of penalties (*not deficiency taxes*) where penalties only are involved? We call the Court's attention to the fact that penalties (*not deficiency taxes*), and penalties only, are assessed against these petitioners (see Exhibit A(1) and A(4), Appendix, pages 62, 66, 67). His Honor, Judge Brooks, the respondent says:

> "The action was filed by the plaintiffs against the Director of Internal Revenue to restrain the collection of a deficiency assessed against them for failure to pay installments of estimated income tax for the year 1953 when they were due as provided by Section 294(d) of the 1939 Internal Revenue Code."

(See Exhibit "J," Appendix, pages 94-96). His Honor, the respondent, is in error. *It was not a deficiency assessed. It was a penalty assessed.* This was not a deficiency assessment of a tax against your petitioners as is defined in 26 USC, Section 271(a)(1) of 53 Stat. 82, as amended May 29, 1944, which is Part (1), Section 14(a) Stat. 245, but was the *assessment of penalties—pure and simple.*

In his Order the respondent further states that:

> "Section 7421 (a) provides that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court' the exception to the plain wording of this Section is where special and extraordinary circumstances are present justifying equitable relief." (Miller v. Standard Nut Margarine Co., 284 U. S. 498; Dyer v. Gallagher, 203 F. 2d 477 (6 Cir.)

(See Exhibit "J," Appendix, pages 94-96.)

This Court, and many of the United States Circuit courts, as well as some District courts, *have held that the assessment of penalties is an exception, being special and extraordinary circumstances justifying equitable relief, to the above-quoted statute, and the collection thereof may be enjoined by the District courts.*

In National Foundry Co. of New York, Inc. v. Director of Internal Revenue, 229 F. 2d 149, 2 CCA decided January 20, 1956, the United States Circuit Court of Appeals reversed the District Court in that case and held that the District Court had authority

to enjoin the collection of penalties notwithstanding the statute that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court." In Midwest Haulers, Inc., *et al.* v. Brady, Acting Collector of Internal Revenue, 128 F. 2d 496 (6 CCA), it was held that notwithstanding the above-mentioned statute, the District Cort had a right and should enjoin the Collector of Internal Revenue. In John M. Hirst and Co. v. Gentsch, 133 F. 2d 247 (6 CCA), it was held that notwithstanding the above statute prohibiting suits to enjoin the collector that the District Court should have enjoined him.

In National Foundry Co. v. Director of Internal Revenue, *supra,* the Court said:

> "In his brief Appellee quotes the referee to define the issue now before us as being whether or not the Court can restrain the Director from taking action *'to assess and collect penalties arising in connection with the tax claim filed'.*"

In the case of *Lipke* v. *Lederer,* 259 U. S. 557, 42 S. Ct. 549, 66 L. Ed. 1061, the Court said:

> "THE COLLECTOR DEMANDED PAYMENT OF A PENALTY, AND SECTION 3224, WHICH PROHIBITS SUITS TO RESTRAIN ASSESSMENT OR COLLECTION OF ANY TAX, IS WITHOUT APPLICATION."

The Supreme Court in that case held that the Collector should be, and was, enjoined.

In the case of *Regal Drug Co.,* Petitioner, v. *Wardell,* Collector, 260 U. S. 386, 43 S. Ct. 152, 67 L. Ed.

318, the Collector was enjoined. In the course of the opinion, we find the following significant language:

> "NONE OF THE LEVIES WERE EITHER TAXES OR ASSESSMENTS, BUT WERE FINES AND PENALTIES IMPOSED ON COMPLAINANT WITHOUT NOTICE OR A HEARING."

This is exactly the situation in the case at bar.

From the case of *Miller, Collector of Internal Revenue* v. *Standard Nut Margarine Co. of Florida*, 284 U. S. 498, 52 S. Ct. 260, 76 L. Ed. 422, we quote:

> "The complaint asserts that the exaction of ten cents per pound, *while in the guise of a tax, is really a penalty imposed* to eliminate competition."

None of the correspondence from the District Collector's office in the case at bar even pretends that what he seeks to collect is anything other than a penalty.

From the Opinion in *Allen, Collector*, v. *Regents University System of Georgia*, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448, we quote:

> "What we have said indicates that Rev. Stat. Section 3224, supra, does not oust the jurisdiction. *The statute is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent, but of a PENALTY for the failure to collect it from another.*"

In each of the above cases it was held that an injunction would lie notwithstandng the section of the Internal Revenue Code relied upon, in Action 3216, by the defendants in that action, William M. Gray, *et al.*

The case of Miller v. Standard Nut Margarine Co., *supra,* cited by the respondent in his Order, sustains petitioners and not the respondent. The case of Dyer v. Gallagher, 203 F. 2d 477, cited by the respondent as sustaining his position, is not applicable, for there was no question of penalties involved in that case. In Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 (6 CCA), there were taxes as well as penalties involved, and the 6th Circuit Court of Appeals recognized that when there were penalties alone involved the rule was that the Collector might be enjoined, for in the course of the Opinion the Court said:

> "The cases on which appellee relies relate solely to penalties and because of this are inapplicable to the case at bar."

No question of penalties was involved in Long v. Gray, 130 F. Supp. 194 (Ky.). We believe that each of the cases cited by the respondent are distinguishable from the case at bar.

We most respectfully insist, under the authority of this Court, that where penalties alone** (not deficiency taxes) **are assessed the District Court has authority, notwithstanding the statute that "no suit shall be," etc., to restrain and enjoin the collector and, that the District Court in the case at bar should have done so. The

assessment of penalties alone, is an exception and is a special and extraordinary circumstance justifying equitable relief by injunction.

(3) 28 USC SECTION 7421 (a) IS UNCONSTITUTIONAL. Perhaps the constitutionality of 28 USC Section 7421 (a) providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court" has never been called in question. This Statute has been in force about ninety years and, although it is not our purpose at this time to argue at length, we most earnesly maintain that this very statute is unconstitutional and contrary to the due process clauses of the Fifth and Fourteenth Amendments.

(4) FIRST AND MOST IMPORTANT QUESTION PRESENTED FOR REVIEW—CONSTITUTIONAL. We now shall discuss the constitutionality of Sections 26 USC, Section 294(d)(1)(A) and (B) and the Respondent's duty, under Section 28 USC, 2284, to convene a three-judge court. In his Order of July 3, 1957 (see Exhibit "J," Appendix, pages 94-96) the respondent says:

> "The plaintiffs further request that a three-judge court be convened because of the alleged unconstitutionality of the taxing statute. Since for the reasons given before a substantial federal question is not presented by the complaint, a three-judge court cannot be convened. California Water Service Co. v. Redding, 304 U. S. 252, 82 L. Ed. 1323; Ex Parte Poresky, 290 U. S. 30".

In your petitioners' Third Amended Complaint (see Exhibit "G", Appendix, pages 87-89) your petitioners alleged as follows:

> "and for said further Amendment they state that U.S.C.A. Title 28, Section 294 (d), (1)(A) and (B) in force in 1953, by which the defendant, the Collector, attempts to distrain the penalties heretofore mentioned in the pleadings, insofar as said section gives power to the Commission or Collector to assess penalties according to his own whim or caprice, that is, his satisfaction, is contrary to the Fifth Amendment of the Constitution of the United States, in that it permits him to distrain and take plaintiffs' property and money, without due process of law, that is, it permits him to take, distrain and appropriate these plaintiffs' money without notice or an opportunity to be heard, which is, without due process of law, contrary to the above section of the Constitution of the United States, and void.
>
> "WHEREFORE, plaintiffs pray as in their original and amended complaints, and they further pray that said Section 294 (d), (1), (A), and (B) of Title 26 U.S.C.A. be held contrary to the Fifth Amendment of the Constitution of the United States and void."

In the case of Mosher v. City of Phoenix, *supra*, the District Court and the Circuit Court of Appeals held that the Federal Court did not have any jurisdiction because no federal constitutional question was raised. In that Opinion, it is stated that:

> "Petitioner also alleged, in No. 6, after setting forth her title, her claim as to the width of the

street in question, and the action of the city in including her property as a part of the street and in contracting for the street improvement upon that basis, that the city was thereby 'attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use thereof without due process of law, or any process of law, * * * and in violation of the rights of plaintiff as guaranteed her under the Constitution of the United States, and particularly under Amendments 5 and 14 thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant city in the proposed taking of her property as hereinbefore described."

In reversing the District and Circuit Court's Orders, speaking through the late Chief Justice Hughes, the Court, in that Opinion, said:

"WE ARE OF THE OPINION THAT THE ALLEGATIONS OF THE BILLS OF COMPLAINT THAT THE CITY ACTING UNDER COLOR OF STATE AUTHORITY WAS VIOLATING THE ASSERTED PRIVATE RIGHT SECURED BY THE FEDERAL CONSTITUTION PRESENTED A SUBSTANTIAL FEDERAL QUESTION AND THAT IT WAS ERROR OF THE DISTRICT COURT TO REFUSE JURISDICTION.

"DECREES REVERSED".

WE MOST RESPECTFULLY SUBMIT THAT UNDER THE AUTHORITY OF THE MOSHER CASE, SUPRA, YOUR PETITIONERS IN THEIR THIRD AMENDED COMPLAINT QUOTED ABOVE STATED AND PLEAD FACTS WHICH PRESENTED A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION AND THAT IT WAS ERROR ON THE PART OF THE RESPONDENT NOT TO CONVENE A THREE-JUDGE COURT.

In the case of Metropolitan Water Company, 220 U. S. 539, 31 S. Ct. 600, 55 L. Ed. 575, the petitioner sought an injunction under 28 USC, Section 2281, and requested a three-judge court. A United States Circuit Judge, acting as a District Judge, declined to convene a three-judge court and entered an Order to that effect. The Opinion of this Court was rendered by the late Chief Justice White. A mandamus was sought in that case as your petitioners are seeking in this case. This Court granted a rule for a Writ of Mandamus. From that Opinion, we quote:

> "This is a proceeding in mandamus, in which relief is sought against a district judge * * * the suit being of the nature just stated, we are of the opinion that the provisions of the Act of Congress which are relied upon applied to the case, and that, as a result of their application, it imperatively follows that the hearing and determination of the request for a temporary injunction should have been had before a court consisting of three judges, constituted in the mode specified in the Statute * * *.

"IT IS THE HEARING BEFORE THE COURT THUS CONSTITUTED, ALSO, THAT IS REQUIRED TO BE EXPEDITED; AND THE APPEAL AUTHORIZED BY THE SECTION TO BE TAKEN DIRECTLY TO THIS COURT 'FROM THE ORDER GRANTING OR DENYING, AFTER NOTICE AND HEARING, AN INTERLOCUTORY INJUNCTION,' IS MANIFESTLY AN APPEAL FROM THE EXPEDITED HEARING HAD BEFORE THE COURT CONSISTING OF THREE JUDGES. WE FIND NO EXPRESSION OF OR ANY IMPLICATION ANYWHERE IN THE SECTION JUSTIFYING THE ASSUMPTION THAT THERE WAS AN INTENTION ON THE PART OF CONGRESS THAT THE SINGLE JUSTICE OR JUDGE TO WHOM THE APPLICATION FOR THE INTERLOCUTORY INJUNCTION SHOULD BE PRESENTED NEED NOT CALL TO HIS ASSISTANCE TWO OTHER JUDGES TO PASS UPON THE APPLICATION, IN THE EVENT THAT HE WAS OF THE OPINION THAT THE CLAIM OF THE UNCONSTITUTIONALITY OF THE STATUTE WAS UNTENABLE. ON THE CONTRARY, THE STATUTE EVIDENCES THE PURPOSE OF CONGRESS THAT THE APPLICATION FOR THE INTERLOCUTORY INJUNCTION SHOULD BE HEARD BEFORE THE ENLARGED COURT, WHETHER THE CLAIM OF UNCONSTITUTIONALITY BE OR BE NOT MERITORIOUS, AS THE APPEAL ALLOWED TO THIS COURT IS FROM AN ORDER DENYING AS WELL AS FROM AN ORDER GRANTING AN INJUNCTION.

"Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges, constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right to such injunction. It follows, therefore, that in hearing and determining the application for the temporary injunction the single judge acted without jurisdiction, and that the order entered by him on March 6, 1911, vacating the restraining order theretofore issued, and denying the APPLICATION FOR AN INJUNCTION, WAS VOID. THIS BEING THE CASE, IT NECESSARILY FOLLOWS THAT MANDAMUS IS THE PROPER REMEDY, SINCE THE SECTION MADE NO PROVISION FOR AN APPEAL FROM AN ORDER MADE BY A SINGLE JUDGE, DENYING AN INTERLOCUTORY INJUNCTION, AND A RIGHT OF APPEAL IS NOT OTHERWISE GIVEN BY STATUTE. Ex Parte Harding, 219 U. S. 363, ante, 252, 31 Sup. Ct. Rep. 324."

In the Matter of Ex Parte Valerie Cogdell, *et al.* (342 U. S. 163, 96 L. Ed. 181, 72 S. Ct. 196) this Court granted a Motion for a Writ of Mandamus directing that a court of three judges be convened to hear and determine constitutional questions. See also Ex Parte Republic of Peru, *supra,* page 16, Paragraph 9A.

We most respectfully submit that the opinions of this Court herein just mentioned above control this case.

The respondent takes the mistaken position that the case of the California Water Service Company v. Redding 304, U. S. 252, 58 S. Ct. 865, 82 L. Ed. 1323, is authority for his refusal to convene a three-judge court. But, in this he is very much mistaken. For, in that case, a three-judge court was convened and the appeal to this court was taken from the order of the three-judge court (as was stated in Metropolitan Water Company, *supra*)—the respondent, Judge Brooks, in the case at bar had no right to assume that no constitutional question was raised.

(5) VIOLATION OF CONSTITUTIONAL RIGHTS—FIFTH AND FOURTEENTH AMENDMENTS—DUE PROCESS—BY MINISTERIAL AND EXECUTIVE OFFICERS. We wish to call the Court's attention to three of its Opinions which involve orders of the ministerial or executive officers, which we believe have a pertinent bearing on the case at bar.

The first case which we call the Court's attention to is that of Morgan, *et al.* v. United States, *et al.*, 304 U. S. 1, 82 L. Ed. 1129, 58 S. Ct. 773. In that case the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies of the Kansas City Stock Yards was involved. From that opinion we quote at length, as follows:

> "The District Court had struck from plaintiffs' bills' the allegations that the Secretary had made the order without having heard or read the evidence and without having heard or considered the arguments submitted, and that his sole infor-

mation with respect to the proceeding was derived from consultation with employees in the Department of Agriculture. We held that it was error to strike these allegations, that the defendant should be required to answer them, and that the question whether plaintiffs had a proper hearing should be determined. 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288. * * *

"The District Court rendered an opinion, with findings of fact and conclusions of law, holding that the hearing before the Secretary was adequate and, on the merits that his order was lawful. On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute and (2) that the order was arbitrary and unsupported by substantial evidence.

"The first question goes to the very foundation of the action of administrative agencies * * *.

"THESE DEMAND 'A FAIR AND OPEN HEARING,' ESSENTIAL ALIKE TO THE LEGAL VALIDITY OF THE ADMINISTRATIVE REGULATION AND TO THE MAINTENANCE OF PUBLIC CONFIDENCE IN THE VALUE AND SOUNDNESS OF THIS IMPORTANT GOVERNMENTAL PROCESS. Such a hearing has been described as an inexorable safeguard. * * *

"But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren

one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its *proposals before it issues its final command.* * * *

"As the hearing was fatally defective, the order of the Secretary was invalid."

In the case of Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General of the United States, *et al.*, and similar cases, 341 U. S. 123, and 95 L. Ed. 817 there was sought an action for declaration of rights and injunctive relief against an order issued by the Attorney General; Constitutional questions, including the Fifth Amendment, were involved. The opinion and concurring opinions and dissenting opinions cover pages 624 to 669 in the Supreme Court Reporter. From the opinion and concurring opinions of the Supreme Court we wish to quote the following:

"It does, however, state that the actions of the Attorney General and the Loyalty Review Board which are complained of are unauthorized and without warrant in law and amount to a deprivation of the complainant's rights in violation of the Constitution; that Executive Order No. 9835, on its face and as construed and applied, violates the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States and that Section 9A of the Hatch Act, 53 Stat. 1148, Ch. 410, 5 U.S.C. (1946 ed., Supp. III) Sec. 118j, insofar as it purports to authorize the instant application of the order, is void. It asks for declaratory and

injunctive relief, alleging that the complaining organization is suffering irreparable loss and that no adequate remedy is available to it except through the equity powers of the District Court. That court granted a motion to dismiss the complaint for its failure to state a claim upon which relief could be granted and denied the complainant's motion for a preliminary injunction. The Court of Appeals affirmed, one judge dissenting. 85 U. S. App. D.C. 255, 177 F. 2d 79. * * *

"If, upon the allegations in any of these complaints, it had appeared that the acts of the respondents, from which relief was sought, were authorized by the President under his Executive Order No. 9835, the case would have bristled with constitutional issues. On that basis the complaint would have raised questions as to the justiciability and merit of claims based upon the First, Fifth, Ninth and Tenth Amendments to the Constitution. * * *

"Since we find that the conduct ascribed to the Attorney General by the complaints is patently arbitrary, the deference ordinarily due administrative construction of an administrative order is not sufficient to bring his alleged conduct within the authority conferred by Executive Order No. 9835. The doctrine of administrative construction never has been carried so far as to permit *administrative discretion to run riot.* * * *

"It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. * * *

"Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings, e.g., Coe v. Armour Fertilizer Works, 237

U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027. Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity, are tolerated. Ownbey v. Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837; Endicott-Johnson Corp. v. Encyclopédia Press, 266 U. S. 285, 45 S. Ct. 61, 69 L. Ed. 288; see Cooke v. United States, 267 U. S. 517, 536, 45 S. Ct. 390, 394, 69 L. Ed. 767. * * *

"It is not true that the evils against which the Loyalty Order was directed are wholly devoid of analogy in our own history. The circumstances attending the Napoleonic conflicts, which gave rise to the Sedition Act of 1798, 1 Stat. 596, readily come to mind. But it is true that the executive action now under scrutiny is of a sort not heretofore challenged in this Court. That of itself does not justify the ex parte summary designation procedure. It does make it necessary to consider its validity when judged by our whole experience with the Due Process Clause.

"The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, *so as to observe due process in its basic meaning.*

"The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

The case of Gonzales v. United States, 348 U. S. 407, 75 S. Ct. 409, involved an order of the Selective Service Board requiring Gonzales to submit to induction in the Armed Forces. The order was issued without an opportunity being given to him to be heard and properly represented. The District Court and the Sixth Circuit Court of Appeals held against Gonzales, and the Supreme Court of the United States reversed their decisions on the ground that the appellant, Gonzales, had not had a fair, just and open hearing. We think that case is very persuasive, and so are the other two cases above mentioned. They show that the courts must put a restraining hand on the abuse of power and authority by ministerial and administrative officers in issuing orders against citizens without notice and the opportunity to be heard.

(6) 26 USC, SECTIONS 294 (d)(1), (A) and (B) ARE UNCONSTITUTIONAL AND CONTRARY TO THE DUE PROCESS OF LAW OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Had Congress enacted a law that there should be imposed a penalty of a certain percent (not exorbitant or unreasonable) for failure to pay income taxes by a certain date or for failure to file estimated taxes on a date certain, then the law itself would constitute notice, then every citizen would be presumed to know the law and he could not claim that the imposition of said penalties were without notice or hearing or without due process of law. Congress, certainly, has the constitutional power and authority to state that certain penalties shall be imposed for failure to pay income

taxes by a certain date or for failure to file estimated taxes at certain periods. But, Congress has no constitutional right to delegate to executive, ministerial or administrative officers of the income tax division, or any of the Departments of Revenue, the power and authority to impose penalties, without notice or hearing. So, when Congress, in the Sections above referred to, namely:

> "(A) *Failure to file declaration.* In the case of a failure to make and file a declaration of estimated tax within the time prescribed, UNLESS SUCH FAILURE IS SHOWN TO THE SATISFACTION OF THE COMMISSIONER TO BE DUE TO REASONABLE CAUSE AND NOT TO WILLFUL NEGLECT, there shall be added to the tax 5 per centum of each installment due but unpaid."

and

> "(B) *Failure to pay installments of estimated tax declared.* Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the COMMISSIONER HAS FOUND THAT FAILURE TO MAKE AND FILE SUCH DECLARATION WITHIN THE TIME PRESCRIBED WAS DUE TO REASONABLE CAUSE AND NOT TO WILLFUL NEGLECT, in the case of a failure to pay an installment of the estimated tax within the time prescribed, UNLESS SUCH A FAILURE IS SHOWN TO THE SATISFACTION OF THE COMMISSIONER TO BE REASONABLE CAUSE AND

NOT TO WILLFUL NEGLECT, there shall be added to the tax 5 per centum of the unpaid amount of such installment,"

put it in the hands and power of the administrative officers of the Internal Revenue Department to determine according to his own caprice or whim, without notice and opportunity to be heard by the taxpayer, to assess penalties, Congress thereby clothed such ministerial, executive and administrative officers with power and authority, which is clearly a violation of the due process clause of the Fifth and Fourteenth Amendments. The Court may think that this is drawing a fine distinction and splitting hairs but it is not. It is a grave and dangerous tendency now on the part of Congress to delegate to ministerial and executive officers powers which are clearly contrary to the due process clause.

The case of Lipke v. Lederer, *supra,* is clearly in point. In that case the Collector attempted to do exactly what he is trying to do in the case at bar. From that opinion we quote:

"The bill alleges: * * *

"That on March 18, 1921, complainant received a written communication from the defendant which stated:

'Notice is hereby given that there has been assessed against you the amount of tax stated on this notice. Demand is hereby made for the immediate payment of said tax. If payment is not made within ten days after date of this notice, a penalty of 5 per cent of the amount of

tax due will be added, plus interest at the rate of 1 per cent per month until paid.' * * *

"The prayer is for an injunction restraining the defendant from proceeding to collect the sum demanded by warrant of seizure, distress, or sale or otherwise, and requiring a cancellation of the so-called 'tax bills'.

"Appellant maintains that the demand upon him was not for taxes, but for a penalty for an alleged criminal act; that the method adopted for enforcing his penalty is contrary to the federal constitution; and that, if construed as appellee insists it should be, section 35 is unconstitutional. * * *

"The cause is properly here by direct appeal from the District Court. Appellant claimed that, as construed and sought to be enforced by the collector, section 35 of the Prohibition Act conflicts with the federal constitution. The point is substantial, and sufficient to support our jurisdiction. Towe v. Eisner, 245 U. S. 418, 425, 38 Sup. Ct. 158, 62 L. Ed. 372, L.R.A. 1918D, 254; Dahnke-Walker Mill Co. v. Boundurant, 257 U. S. 282, 42 Sup. Ct. 106, 66 L. Ed. 239 (December 12, 1921); South Covington, etc., Ry. Co. v. Newport, 259 U. S. 97, 42 Sup. Ct. 418, 66 L. Ed.— (May 15, 1922). * * *

"The collector demanded payment of a penalty, and section 3224, which prohibits suits to restrain assessment or collection of any tax, is without application. And the same is true as to statutes granting the right to sue for taxes paid under protest. * * *

"The decree of the court below must be reversed, and the cause remanded for further proceedings in conformity with this opinion."

Under the general heading of "Due Process of Law" in revenue cases, Black on page 582 of his Third Edition on CONSTITUTIONAL LAW says:

"The assessment of property for taxation is lacking in the element of due process of law if made according to an arbitrary rule, or if in any way irrational or oppressive, or if the property of the taxpayer is taken from *him without giving him notice of the charge imposed upon him or an opportunity to contest the validity or the amount* of the assessment."

From Cooleys' CONSTITUTIONAL LIMITATIONS, Seventh Edition, pages 500, etc., we quote:

"The protection of the subject in the free enjoyment of his life, his liberty, and his property, except as they might be declared by the judgment of his peers or the law of the land to be forfeited, was guaranteed by the 29th Chapter of the Magna Charta, which 'alone' says Sir William Blackstone, 'would have merited the title that it bears of The Great Charter.'

"The people of the American states, holding the sovereignty in their own hands, have no occasion to exact pledges from anyone due a due observation of individual rights, but THE AGGRESSIVE TENDENCY OF POWER IS SUCH, that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their

agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection * * *.

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case:

> 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; *which proceeds upon inquiry, and renders judgment only after trial.* The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. EVERYTHING WHICH MAY PASS UNDER THE FORM OF AN ENACTMENT IS NOT, THEREFORE, TO BE CONSIDERED THE LAW OF THE LAND.'"

Kentucky, and I presume every State in the Union, fixes a penalty for non-payment of property taxes by a certain date. Such a law is constitutional because it is notice and every taxpayer knows that there will be a penalty if he does not pay his taxes by a certain time. But, neither Kentucky nor any other States so far as we know permits or allows its tax-collecting authorities, generally the sheriff, to impose penalties of his own accord if he thinks the taxpayer has willfully neglected to pay his taxes, or if he thinks no cause existed for their non-payment.

We most respectfully insist, for the reasons herein above stated, that 26 USC, Section 294(d)(1)(A) and (B) are unconstitutional and void.

(7) HISTORICAL BACKGROUND AND BASIS OF THAT PART OF THE FIFTH AMENDMENT HEREINABOVE QUOTE AND INVOKED.

Long before Ahab (by means of concocted murder by his most evil wife, Jezebel) seized and confiscated Naboth's vineyard; long before Jeroboam and the Israelites said "To your tents, O Isarel," because Rehoboam would not listen to the cry of his people, against the burdensome taxation of Solomon, his father, men have struggled for their inalienable rights to notice and a fair hearing before their property should be taken for taxes or public purposes.

But let us come to more modern times. Historians tell us that the abuse of taxing power (no notice or opportunity to be heard) was one of the greatest factors that led to wresting from King John at Runnymede, in 1215 A.D., the great and famous Magna Charta. Similar abuses along the same line arose again, and by the Bill of Rights, in 1685, the English people sought to, and did, correct them. In our own infancy, or possibly we should say our young manhood, before our independence, we cried out, "Taxation without representation is tyranny". All of this, and much more, was in the minds of our forefathers when they incorporated in the Fifth Amendment to the United States Constitution the above quoted language. We most respectfully repeat (*we are persuaded the Court will be patient*) that it is not only the duty, but the privilege of the Court to stay and prevent the violation of this inalienable right of the American citizens.

(8) NO ADEQUATE REMEDY AT LAW.

The respondent in his Order of July 3, 1957 (see Exhibit "J," Appendix, pages 94-96) implies that these petitioners have an adequate remedy at law. The District Director, William M. Gray, informed us that we could (1) have a conference and if dissatisfied we could (2) file a written protest and would be granted, if requested, a conference in the Appellate Division of the Regional Commissioner's Office (3) and that if dissatisfied with the ruling of the Regional Commissioner's Office we could then appeal to the Tax Court and (4) if dissatisfied with the tax court's ruling, we could then go to the United States Circuit Court of Appeals. To disprove the alleged penalty claim of the Director, the burden is upon the taxpayer. To say that the taxpayer who (especially small claims from $50.00 to $500.00) must go through all of the various commissions and courts above-mentioned to disprove penalties assessed against him without notice or hearing, has an adequate remedy at law, is in the writer's opinion, a sham and mockery. No taxpayer can afford to pay a lawyer to fight such a claim and, in fact, he cannot afford even personally to try to attend to it himself.

Under the Code 26 USC 294, *supra*, the commissioner can presume, and most of the time he does presume, that the taxpayer has neither a reasonable cause for delay in his favor or that the taxpayer is willfully negligent. In Allen v. Regents University of Georgia, *supra*, this Court said:

"What we have said indicated that Revised Statutes, Section 3224, *supra*, does not oust the jurisdiction. THE STATUTE IS INAPPLICABLE IN EXCEPTIONAL CASES WHERE THERE IS NO PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW. *This is such a case, for here the assessment is not of a tax payable by respondent, but of a* PENALTY *for the failure to collect it from another.*"

We most respectfully submit that your petitioners and the tens of thousands similarly situated have no adequate remedy at law under the process outlined above that they would have to go through with.

(9) "TAX LAWS SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF TAXPAYERS."

"IT IS ELEMENTARY THAT TAX LAWS ARE TO BE INTERPRETED LIBERALLY IN FAVOR OF TAXPAYERS, * * * DOUBTS MUST BE RESOLVED AGAINST THE GOVERNMENT AND IN FAVOR OF TAXPAYERS."

Miller, Collector v. Standard Nut Margarine Co. of Florida, 284 U. S. 498, 52—S. Ct. 260-76 L. Ed. 422; United States v. Merriam, 263 U. S. 179, 188, 44 S. Ct. 69, 68 L. Ed. 240, 29 A.L.R. 1547; Bowers v. N. Y. & Albany Co., 273 U. S. 346, 350, 47 S. Ct. 389, 71 L. Ed. 676.

We most respectfully submit that if tax laws are to be liberally construed in favor of the taxpayer, then this Honorable Court should hold 26 USC, Section 294, (d)(1)(A) and (B) unconstitutional and void as

against the due process clause of the Fifth and Fourteenth Amendments.

(10) POWER TO TAX—POWER TO DESTROY.

In M'Culloch v. State of Maryland, *et al.*, 17 U. S. 316, 4 Wheat 316, 4 L. Ed. 579, at page 607, the Supreme Court of the United States, speaking through Chief Justice John Marshall, one of America's foremost Judges, said:

> "THAT THE POWER TO TAX INVOLVES THE POWER TO DESTROY; THAT THE POWER TO DESTROY MAY DEFEAT AND RENDER USELESS THE POWER TO CREATE; * * * TAXATION, IT IS SAID, DOES NOT NECESSARILY AND UNAVOIDABLY DESTROY. TO CARRY IT TO THE EXCESS OF DESTRUCTION WOULD BE AN ABUSE, TO PRESUME WHICH, WOULD BANISH THAT CONFIDENCE WHICH IS ESSENTIAL TO ALL GOVERNMENT."

We respectfully submit that the Court may well consider, in connection with this action, what Judge Marshall had to say in the above captioned action.

ABUSE OF TAXING POWER—A MOST POTENT FACTOR IN THE OVERTHROW OF GOVERNMENTS, DOWNFALL OF KINGDOMS, NATIONS AND EMPIRES.

We do not mention this frivolously or lightly, but in the hopes that the Court will seriously reflect upon and consider it. A reasonably careful study of history

discloses that the overthrow of governments, the downfall of kingdoms, nations and empires from the earliest pages of recorded history, yes, even from the remotest dawn of antiquity, resulted from the abuse of taxing power and authority. The founders and creators (our forefathers, they were not only learned, able and honorable men, but they loved, revered and respected liberty, fredom, justice and judgment in civil affairs) of our constitutional form of government understood this. They determined to protect the inalienable rights of men to due notice and an opportunity for a fair hearing before their property could be seized for taxes. They realized the necessity of that part of the Fifth Amendment above quoted.

We most respectfully and sincerely insist that it is not only the duty, but the privilege of the Court to see to it that this safeguard above quoted of the Fifth Amendment is inviolably preserved in behalf of, even the humblest and most lowly, the citizens of this our great country, that it may be forever the home of the free and the brave.

(11) DANGER.

In an address before the Young Men's Lyceum of Springfield, Illinois on January 27, 1838, Abraham Lincoln said:

> "How then shall we perform it?—At what point shall we expect the approach of danger? By what means shall we fortify against it?—Shall we expect some transatlantic military giant, to step the Ocean, and crush us at a blow: Never!—All the armies of Europe, Asia and Africa combined,

with all the treasure of the earth (our own excepted) in their military chest; with a Bonaparte for a commander, could not by force, take a drink from the Ohio, or make a track on the Blue Ridge, in a trial of a thousand years.

"AT WHAT POINT THEN IS THE APPROACH OF DANGER TO BE EXPECTED? I ANSWER, IF IT EVER REACH US, IT MUST SPRING UP AMONGST US. IT CANNOT COME FROM ABROAD. IF DESTRUCTION BE OUR LOT, WE MUST OURSELVES BE ITS AUTHOR AND FINISHER. AS A NATION OF FREEMEN, WE MUST LIVE THROUGH ALL TIME, OR DIE BY SUICIDE."

When King Solomon died, his son, Rehoboam, not only despotically refused to lighten the burden of taxation, but autocratically said he would increase the taxation. Whereupon, Jereboam, said, "TO YOUR TENTS OH ISRAEL" and the glorious kingdom of a great people was rent in twain, never to arise again as a great nation. Even a casual reading from the earliest pages of recorded history, shows that nations, kingdoms and empires, regardless of the kind and form of government, fell from decay within, and that one of the most potent factors of decay was the arbitrary and despotic levy and collection of taxes. The arbitrary and unrestrained assessment of taxes (in the case at bar—penalties) is one of the most potent factors in the downfall of any people.

If the taxpayers (the petitioners in the case at bar) cannot look to the Federal Courts (our Federal Courts

surely are and ought to be the guardians and fountains of justice, judgment and equity) to restrain collectors from the abuse of their authority and power, then pray where can we look? Of course, the taxpayer can go through various tax commissions and tax hearings, tax courts and then finally appeal to the United States Circuit Court of Appeals, but in reality (it may possibly be theoretically), it is not an adequate remedy at law. Furthermore, the Supreme Court of the United States and the Sixth Circuit Court of Appeals have held that the District Court has a right and jurisdiction to enjoin the collector from collecting penalties.

"Eternal Vigilance is the price of liberty". (Daniel Webster.)

"God grants liberty only to those who love it, and are always ready to guard and defend it." (Daniel Webster.)

Though we do not always see eye to eye with this Honorable Court yet we realize that the American people must look to this Honorable Court to continually guard and protect their inalienable rights and liberty as guaranteed under the Constitution.

10. PRAYER—GRATITUDE—NOT ALMOST BUT ALTOGETHER PERSUADED.

A. PRAYER.

Lord Tennyson, in Morte D'Arthur, said: "More things are wrought by prayer than this world dreams of". It is said that Washington, affectionately called the Father of our Country, was seen on his knees in prayer during the darkest hours of the Revolutionary War, and that at the very outset of the Constitutional

Convention of the United States of America, he said: "The event is in the hands of God". According to the historian Bancroft's record, our Constitutional Convention was "on the verge of dissolution, scarce held together by the strength of a hair". When that grand old man, statesman, philosopher and practical economist, Benjamin Franklin, in order to restore calm, proposed that the Convention should be opened every morning by prayer. "Fondly do we hope and fervently do we pray", said Abraham Lincoln, one of the most compassionate, kind, gentle, yet firm and courageous men that the world has ever known, in his Second Inaugural Address. It is said that he was often in agonizing prayer during the dark days of our own Civil War. It is said that Robert E. Lee, possibly the greatest military genius that the English-speaking race has produced, but certainly one of the most noble men, one of unstained honor, that our country has known, prayed that God's will be done regardless of whether the South or North won. The Psalmist said:

> "Evening, and morning, and at noon, will I pray, and cry aloud: and He shall hear my voice." (Verse 17, Psalm 55.)

In the Sixth Chapter of the Book of Daniel, Verses 10 and 22, it is written:

> "Now when Daniel knew that the writing was signed, he went into his house; and his windows being open in his chamber toward Jerusalem, he kneeled upon his knees three times a day, and prayed, and gave thanks before his God, as he did aforetime. * * *

"My God hath sent his angel, and hath shut the lions' mouths, that they have not hurt me: forasmuch as before him innocency was found in me; and also before thee, O king, have I done no hurt."

Our Lord and Master said:

"And when thou prayest, thou shall not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward.

"But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly.

"But when ye pray, use not vain repetitions, as the heathern do: for they think that they shall be heard for their much speaking.

"Be not ye therefore like unto them: for your Father knoweth what things ye have need of, before ye ask him." (Verses 5 to 8, inclusive, Gospel of Matthew, Chapter VI.)

A prayerless life, a prayerless community, people, nation or world is like a ship on a storm-tossed sea in Stygian darkness, without a ray of light, without a port, without a harbor, without a rudder and without a pilot.

If the American people—yes—even all the peoples of the world, would daily go to their closets alone in prayer, doubtless, most of our and the world's problems—financial, economical, social, racial, industrial, political, educational, labor, religious, and all other

problems would be readily, peacefully and amicably adjusted.

Immense libraries could be written on this subject. Therefore, we are not ashamed to confess to this Honorable Court that we shall humbly and fervently pray that this Court, if it be God's will, will sustain our Motion for Leave to File our Petition and will sustain our Petition and grant the relief sought.

B. GRATITUDE.

"Blow, blow, thou winter wind,
Thou art not so unkind
As Man's ingratitude;
Thy tooth is not so keen
Because thou art not seen, * * *

"Freeze, freeze, thou bitter sky,
That dost not bite so nigh
As benefits forgot;
Though thou the waters warp,
Thy sting is not so sharp
As friend remember'd not".
("As You Like It", Act II, Scene 7, Shakespeare.)

Our Lord healed ten lepers. Only one, a stranger, returned to thank Him. (Luke's Gospel, Chapter 17, Verses 11-19.)

Your petitioners like the stranger are grateful for the opportunity of personally appearing and pleading their own cause, and that of every Income Tax payer, before this Honorable Court.

C. NOT ALMOST BUT ALTOGETHER PERSUADED.

When the Apostle Paul stood before King Agrippa, he said:

> "I think myself happy, King Agrippa, because I shall answer for myself this day before thee touching all the things whereof I am accused of the Jews." (Acts, Chapter 26, Verse 2.)

So, we, your petitioners, rejoice that we, just lowly and obscure citizens of this our great country, have the privilege, and that all others have the privilege of personally appearing and pleading before this Court. We are grateful indeed for the opportunity—we are grateful that still in this great country of ours the most obscure and unknown citizen has the privilege of personally appearing in this Court.

The Apostle Paul, as he continued to plead before King Agrippa, said:

> "King Agrippa, believest thou the prophets? I know that thou believest."
>
> Then Agrippa said unto Paul, "Almost thou persuadest me to be a Christian".
>
> And Paul said, "I would to God, that not only thou, but also all that hear me this day, were both almost, and altogether such as I am, except these bonds." (Acts, Chapter XXVI, Verses 27-29.)

We fondly hope that we have succeeded in not only almost persuading this Honorable Court but have succeeded in convincing it that we are correct and that the Court will grant the relief sought.

Most respectfully submitted.

ROBERT HUBBARD,
LAVINIA HUBBARD,
Petitioners.

EXHIBIT "A" (1), "A" (2).

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY,
LOUISVILLE DIVISION.

Civil Action No. 3216.

Robert Hubbard,
Lavina Hubbard, His Wife, - - - - Plaintiffs,

v.

William M. Gray, District Director of Internal Revenue, District of Kentucky, and
United States Government, - - - Defendants.

STIPULATION.

By agreement of parties hereto, it is stipulated that the photostatic copies hereto attached, chronologically arranged, and marked from 1 to 14, inclusive, are all of the Notices, etcera, and correspondence of the plaintiff, Robert Hubbard, with the defendant, Director Gray, which said plaintiffs now have in their possession, pertaining to the cause of action before the Court, and by agreement of parties is is ordered that they be filed as exhibits in this action.

(s) Henry L. Brooks,
Judge.

12/18/56

(s) Robert Hubbard,
Attorney for Plaintiffs.

(s) J. Leonard Walker by C. Mallon,
Attorney for Defendants.

Copy received, except exhibits.
12/17/56
C. Mallon

Cards

(Emblem)
In Replying Refer to
DD:Ky:A:O:Grp.A

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Louisville 1, Kentucky

April 26, 1955

Robert & Lavinia Hubbard
1823 Yale Drive
Louisville 1, Kentucky

Taxable year(s) ended
1953

The enclosed report, which has been prepared after careful consideration of available information, discloses certain adjustments or conclusions resulting from an examination of your return(s) for the year(s) above indicated.

IF YOU ACCEPT THE FINDINGS, please sign and return promptly the enclosed agreement form. If additional tax is shown to be due, you may either remit such amount together with interest at 6% from the due date of the return to the date of payment, or you may await receipt of a notice of the amount due before making payment.

IF YOU DO NOT ACCEPT THE FINDINGS, you should submit any information which you believe will support your contentions, or, if you prefer, you may call in person at this office to present evidence or information pertinent to the case on any day during business hours except Saturday, Sunday, or a legal holiday. We will be pleased to answer any questions regarding the adjustments, and will give careful attention to all information which you submit.

Your case will be held in abeyance for a period of FIFTEEN DAYS from the date of this letter pending receipt of the signed agreement form or advice that you disagree with the proposed adjustments. IMPORTANT: It is essential that communications relative to this letter be addressed to the District Director of Internal Revenue, Self-addressed envelope enclosed—no postage required, for the attention of Group A, Office Audit.

Very truly yours,

Wm. M. Gray,
District Director of Internal Revenue.
By: (s) E. C. Simpson,
Tax Examiner.

Enclosures:
Report of Examinatior
Agreement Form

SCHEDULE FOR COMPUTATION OF ADDITIONS TO TAX UNDER SECTION 294(d) OF THE INTERNAL REVENUE CODE

For Years Beginning After December 31, 1944

Name of Taxpayer Robert & Lavinia Hubbard

Year 1953

Schedule ——

Computation of Addition to Tax for Substantial Underestimation of Declaration of Estimated Tax Under Section 294(d)(2) of the I.R.C.

(None)

Schedule ——

Failure to File a Declaration of Estimated Tax on Time Section 294(d)(1)(A) or

Failure to Pay Installments when Due Section 294(d)(1)(B)

Corrected Tax		$1,597.02
Less: Withholding Tax Actually Withheld	$ –0–	
Overpayment credit, if any, from a prior year	–0–	–0–
Balance to be divided into 4 installments due		$1,597.02

Amount Due	Installment Due Date	Date Paid	Addition for First Month Unpaid	1% for Each Additional Month or Fraction	Not More Than 10% Assessable
$ 399.26	3–15–53		5%	5	$ 39.93
399.26	6–15–53		5%	5	39.93
399.25	9–15–53		5%	5	39.93
399.25	1–15–54	1–15–54	5%	–0–	–0–
$1,597.02				Addition to Tax	$119.79

DD:Lou:54A-50

Form 870 (1953)
U. S. TREASURY DEPARTMENT
Internal Revenue Service

WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY IN TAX AND ACCEPTANCE OF OVERASSESSMENT

Pursuant to section 272 (d) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws, the restrictions provided in section 272 (a) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

DEFICIENCIES

Type of Tax	Year Ended	Penalty	
Income	1953	294(d)	$119.79

OVERASSESSMENTS

(None)

Robert & Lavinia Hubbard
1823 Yale Drive
Louisville, Kentucky
OP—1000208
DD:KY:A:O:Grp.A:ECS

NOTE: The execution and filing of this form at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a deficiency or a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this form must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

Where the taxpayer is a corporation, the form shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

Form 886-A—Rev. March 1951
U. S. TREASURY DEPARTMENT
Internal Revenue Service

Name Robert & Lavinia Hubbard Year 1953

EXPLANATION OF ITEMS

Addition to Tax $119.79.

Addition to tax has been added for failure to pay installments of Estimated Tax when due.

Section 294 (d) of the 1939 Internal Revenue Code.

Form 1909
Apr. 1954

U. S. Treasury Department—Internal Revenue Service

COMPUTATION OF INCOME TAX—INDIVIDUALS

Name of Taxpayer Robert & Lavinia Hubbard

1.	Corrected adjusted gross income or net income (From schedule)	$8,682.22
3.	If tax table is not applicable: Corrected net income less $600 for each exemption—Income subject to tax	6,882.22
5.	If Line 3 is more than $2,000: Enter tax computed for: (Check appropriate box) ☒ Married persons filing jointly	1,597.02
6.	Less: Adjustment for tax on partially tax exempt interest, if any	0
7.	Tax after above adjustment	1,597.02
9.	Corrected income tax: Line 2, 7, or 8, whichever is applicable	1,597.02
11.	Corrected income tax liability: Line 9 less Line 10	1,597.02
13.	Total corrected income and self-employment tax liability	1,597.02
14.	Income and self-employment tax reported on return	1,597.02
15.	Deficiency (overassessment)	$ 0

COMPUTATION OF ADDITIONAL TAX OR (OVERASSESSMENT)

16.	Total tax liability — (G) Additional tax (overassessment)	$ $
17.	Penalties, if any (Section 294(d))	$ 119.79

(Emblem)
In Replying Refer to
DD:Ky:A:O:Grp.A

U. S. TREASURY DEPARTMENT
Internal Revenue Service
District Director
Louisville 1, Kentucky
May 18, 1955

Robert & Lavinia Hubbard
1823 Yale Drive
Louisville 1, Kentucky

Taxable year(s) ended
1953

The enclosed report, which has been prepared after careful consideration of available information, discloses certain adjustments or conclusions resulting from an examination of your return(s) for the year(s) above indicated.

IF YOU ACCEPT THE FINDINGS, please sign and return promptly the enclosed agreement form. If additional tax is shown to be due, you may either remit such amount together with interest at 6% from the due date of the return to the date of payment, or you may await receipt of a notice of the amount due before making payment.

IF YOU DO NOT ACCEPT THE FINDINGS, you should submit any information which you believe will support your contentions, or, if you prefer, you may call in person at this office to present evidence or information pertinent to the case on any day during business hours except Saturday, Sunday, or a legal holiday. We will be pleased to answer any questions regarding the adjustments, and will give careful attention to all information which you submit.

Your case will be held in abeyance for a period of FIFTEEN DAYS from the date of this letter pending receipt of the signed agreement form or advice that you disagree with the proposed adjustments. IMPORTANT: It

is essential that communications relative to this letter be addressed to the District Director of Internal Revenue, Self-addressed envelope enclosed—no postage required, for the attention of Group A, Office Audit.

Very truly yours,

Wm. M. Gray,
District Director of Internal Revenue.
By: E. C. Simpson,
Tax Examiner.

Enclosures:
Report of Examinatior
Agreement Form

Form 1909
Apr. 1954

U. S. Treasury Department—Internal Revenue Service

COMPUTATION OF INCOME TAX—INDIVIDUALS

Name of Taxpayer Robert & Lavinia Hubbard
Year Ended (or period) 1953

1.	Corrected adjusted gross income or net income (From schedule)	$8,682.22
3.	If tax table is not applicable: *Corrected* net income less $600 for each exemption—Income subject to tax	6,882.22
5.	If Line 3 is more than $2,000: Enter tax computed for: (Check appropriate box) ☒ Married persons filing jointly	1,597.02
7.	Tax after above adjustment	1,597.02
11.	Corrected income tax liability: Line 9 less Line 10	1,597.02
13.	Total corrected income and self-employment tax liability	1,597.02
14.	Income and self-employment tax reported on return	1,597.02
15.	Deficiency (overassessment)	$ 0
17.	Penalties, if any Section 294 (d)	$ 231.57

SCHEDULE FOR COMPUTATION OF ADDITIONS TO TAX UNDER SECTION 294(d) OF THE INTERNAL REVENUE CODE

For Years Beginning After December 31, 1944

Name of Taxpayer Robert & Lavinia Hubbard
Year 1953

Schedule ——

Computation of Addition to Tax for Substantial Underestimation of Declaration of Estimated Tax Under Section 294(d)(2) of the I.R.C.

(a) Corrected Tax		$1,597.02
80% of Above (66⅔% if farmer)		1,277.62
Less: Withholding Tax Actually Withheld	$ 0	
Estimated Tax	0	
Tentative Addition to Tax		$1,277.62
(b) Corrected Tax		$1,597.02
Less: Withholding Tax Actually Withheld	$ 0	
Estimated Tax	0	
Difference		$1,597.02
Tentative Addition to Tax (6% of above balance)		$ 95.82
Addition to Tax: Tentative (a) or (b), whichever is the lesser		$ 95.82

Schedule ____

Failure to File a Declaration of Estimated Tax on Time Section 294 (d)(1)(A) or

Failure to Pay Installments when Due Section 294(d)(1)(B)

Corrected Tax		$1,597.02
Less: Withholding Tax Actually Withheld	$ 0	
Overpayment credit, if any, from a prior year	0	0
Balance to be divided into 4 installments due		$1,597.02

Amount Due	Installment Due Date	Date Paid	Addition for First Month Unpaid	1% for Each Additional Month or Fraction	Not More Than 10% Assessable
$ 399.26	3-15-1953		5%	5%	$ 39.93
399.26	6-15-1953		5%	5%	39.93
399.25	9-15-1953		5%	4%	35.93
399.25	1-15-1954	2-6-1954	5%		19.96
$1,597.02			Addition to Tax		$231.57

DD:Lou:54-A50

Form 886-A—Rev. March 1951
U. S. TREASURY DEPARTMENT
Internal Revenue Service

Name Robert & Lavinia Hubbard Year 1953

EXPLANATION OF ITEMS

Additional to Tax $231.57.

Addition to tax has been added in the amount of $95.82 for substantial underestimation of Declaration of Estimated Tax.

Section 294(d)(1)(A).

Addition to tax has been added in the amount of $135.75 for failure to pay installments when due.

Section 294(d)(1)(A).

It was not noted, when the first assessment was made, that the check for the tax liability submitted January 15, 1954, was postdated to February 6, 1954; therefore, this correction is necessary.

Form 870 (1953)
U. S. TREASURY DEPARTMENT
Internal Revenue Service

WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY IN TAX AND ACCEPTANCE OF OVERASSESSMENT

Pursuant to section 272 (d) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws, the restrictions provided in section 272 (a) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

DEFICIENCES

Type of Tax	Year Ended	Penalty
Income	1953	$231.57

OVERASSESSMENTS

(None)

Robert & Lavinis Hubbard
1823 Yale Drive
Louisville, Kentucky
OP—1000208
DD:KY:A:O:Grp.A:ECS

NOTE: The execution and filing of this form at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a deficiency or a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this form must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

Where the taxpayer is a corporation, the form shall be signed with the corporate name followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Stipulation, including Exhibits 1 and 4, of the total of 14 exhibits, in the Matter of Civil Action No. 3216, Robert Hubbard, Lavina Hubbard, his wife, vs. William M. Gray, District Director of Internal Revenue, District of Kentucky, and United States Government, signed by Honorable Henry L. Brooks, United States District Judge, dated December 18, 1956, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 8th day of August, A.D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,,
Deputy Clerk.

(Seal)

EXHIBIT "B".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Louisville Division
Civil Action No. 3216.

Robert Hubbard,
Lavina Hubbard, His Wife, - - - - - Plaintiffs,

v.

Russell C. Harrington, Commissioner of Internal Revenue,
N. B. Eshleman, Regional Commissioner of Internal Revenue, Cincinnati Region,
William M. Gray, District Director of Internal Revenue, District of Kentucky, - - Defendants.

COMPLAINT IN EQUITY FOR MANDAMUS AND PERMANENT AND TEMPORARY INJUNCTION—
Filed September 28, 1956.

Plaintiff, for cause of action against the defendants, states as follows:

1. That they are residents of 1823 Yale Drive, Louisville, Jefferson County, Kentucky. That the defendant, Russell C. Harrington, the duly appointed, qualified and acting commissioner of Internal Revenue for United States of America; that the defendant, N. B. Eshleman, is the duly appointed and acting Commissioner of Internal Revenue for the Cincinnati Region of the Internal Revenue Service; the defendant, William M. Gray, is the duly appointed, qualified and acting District Director of Internal Revenue for the District of Kentucky.

2. This action arises under Section 58, (a), (c), and (3), 1953 Internal Revenue Code (26 USCA), 294 (d), (1), (A), or (B), U. S. Internal Revenue Code of 1953, (26 USCA).

3. Plaintiff, Robert Hubbard, came to Louisville, Kentucky, September, 35 years ago to engage in the practice of law. On June 1, 1922, he started for himself the general practice of law in Louisville, Kentucky. He has had no, except for a short while, regular paid retainer clients. His income has been some years fairly good, others very poor. Some of the months—most months—have been very low and some months fairly good. Plaintiff, Lavina Hubbard, is a housekeeper and has very little income even with what plaintiff, Robert Hubbard, is able to give her. Plaintiff, Robert Hubbard, had a fairly good financial year for the year of 1953, but paid some pressing obligations and was still heavily in debt on January 1, 1954, and his borrowing ability was very low. On January 15, 1954, plaintiff, Robert Hubbard, filed a Federal Income Tax Return for the plaintiffs herein showing a tax due of $1588 and some cents. On the same day, he wrote a letter to the defendant, collector, in which he enclosed his post-dated check post-dated to February 6, 1954, for $1288 and stated that he would pay the balance on or before the 15th of March, 1954. He did pay the balance and states that he acted diligently and in the utmost good faith and without any intention, willful neglect or disregard of the Internal Revenue Laws or the rules and regulations of the Internal Revenue Department. He further states that thereafter, about April, 1955, the defendant, William M. Gray, without first ascertaining, whether or not this plaintiff, Robert Hubbard's failure, if he did fail, to strictly comply with the subsection of Section 58 of the USCA above mentioned, was due to reasonable cause and not to willful neglect, assessed penalties against these plaintiffs. That under this

plaintiff, Robert Hubbard's construction of Section 58, above mentioned said tax return was filed in time and that there was a substantial compliance with the payment of said tax. Plaintiff, Robert Hubbard, states that he discussed this matter with someone in the Revenue Department there about 17 or 18 months ago and talked to a deputy or deputies. I told them that I did not believe the Commissioner was right and that he had no legal right to assess penalties under the circumstances in my case, and that I would contest collection of said penalties in court. Neither on that or any other occasion, since then has the Commissioner or any of his deputies made any effort to ascertain from this plaintiff whether there was a reasonable cause for his alleged failure to comply strictly with said Section 58 above mentioned or to ascertain whether there was wilful neglect on the part of these plaintiffs. He states that the defendant and his agents have continued to annoy and harass this plaintiff from time to time since and that on the 26th of September, 1956, the defendant, Commissioner wrongfully and contrary to the spirit and intent of the Internal Revenue Code levied on this plaintiff's bank account in the Citizens Fidelity Bank & Trust Company for the sum of $240.52 and that said levy was made to harass and annoy this plaintiff in an attempt to collect a wrongful assessment of penalties.

4. Plaintiff states that the action of the defendant, William M. Gray, complained of in the preceding paragraph has caused, is causing, and will cause these plaintiffs injuries and damages for which there is no adequate remedy in law.

5. Plaintiffs further state that the requirement to file estimated tax returns to the Internal Revenue Code became effective in 1943 and that this plaintiff, Robert Hubbard, has never filed estimated income tax returns, due to his inability from his irregular income to make an intelligent

estimate from 1943 up to and including 1953, and that the defendant, Internal Revenue Commissioner, has during that period of 10 years, not called upon him for any penalties for failure to file estimated tax returns, and that the Commissioner has thereby waived his right to demand the payment of said penalties and he is thereby stopped.

Whereby, plaintiff prays:

1. That the defendant and each of them be summoned.

2. That the defendant and each of them be ordered and directed to release the levy of $240.52 or any sum against the plaintiff, Robert Hubbard's bank account in Citizens Fidelity Bank & Trust Company.

3. That the defendant and each of them be restrained and enjoined from collecting the alleged penalties assessed against these plaintiffs.

(s) Robert Hubbard.

(s) Robert Hubbard,
Attorney for Lavina Hubbard.

Plaintiff, Robert Hubbard, says that the foregoing statements are true.

(s) Robert Hubbard.

Subscribed and sworn to before me by Robert Hubbard this 28th day of September, 1956.

My commission expires May 26, 1960.

(s) Edwin Mengel,
Notary Public,
State At Large, Kentucky.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Complaint in Equity for Mandamus Permanent and Temporary Injunction in the Matter of Civil Action No. 3216, Robert Hubbard, Lavina Hubbard, his wife, vs. Russell C. Harrington, N. B. Eshleman, Regional Commissioner of Internal Revenue, Cincinnati Region, William M. Gray, District Director of Internal Revenue, District of Kentucky, filed September 28, 1956, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 31st day of July, A.D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "C".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Louisville Division
Civil Action No. 3216.

Robert Hubbard,
Lavinia Hubbard, His Wife, - - - - Plaintiffs,

v.

Russell C. Harrington, Commissioner of Internal Revenue,
N. B. Eshleman, Regional Commissioner of Internal Revenue,
William M. Gray, District Director of Internal Revenue, District of Kentucky, - - Defendants.

MOTION TO DISMISS—Filed October 15, 1956.

Russell C. Harrington, Commissioner of Internal Revenue, N. B. Eshleman, Regional Commissioner of Internal Revenue and William M. Gray, District Director of Internal Revenue, the above named defendants, by J. Leonard Walker, United States Attorney for the Western District of Kentucky, respectfully move the Court pursuant to Rule 12 of the Federal Rules of Civil Procedure as follows:

1. To dismiss the above-entitled action against defendant Russell C. Harrington, Commissioner of Internal Revenue, or in lieu thereof to quash the return of service of summons because this Court lacks jurisdiction over the person of said defendant on the ground that said defendant has not been properly served with process in this action.

Rule 4(d)(1) and (f), Federal Rules of Civil Procedure; Caplis v. Helvering, 4 F. Supp. 181 (E.D. N.Y.).

2. To dismiss the above-entitled action against defendant N. B. Eshleman, Regional Commissioner of Internal Revenue, or in lieu thereof to quash the return of service of summons because this Court lacks jurisdiction over the person of said defendant on the ground that said defendant has not been properly served with process in this action. Rule 4(d)(1) and (f), Federal Rules of Civil Procedure; Caplis v. Helvering, 4 F. Supp. 181 (E.D. N.Y.).

3. To dismiss the above-entitled action against each and all of the above named defendants because the complaint fails to state a claim upon which relief can be granted and because it appears on the face of the complaint that the Court lacks jurisdiction over the subject matter on the following grounds:

Since the court is specifically forbidden by legislative mandate to enjoin the administrative collection of federal taxes, it has no jurisdiction to grant such relief. Section 7421(a), Internal Revenue Code, 1954. Dyer v. Gallagher, 203 F. 2d 477 (C.A. 6th); Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 (C.A. 6th); Ohio State Nurses Ass'n. v. Busey, 120 F. 2d 11 (C.A. 6th).

In actions seeking an injunction to restrain the collection of a civil penalty provided for under the Internal Revenue Code, the prohibition of Section 7421(a) is equally applicable. Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 (C.A. 6th); Helvering v. Mitchell, 303 U. S. 391; Headley v. Knox, 133 F. Supp. 36 (Minn.).

This Court lacks jurisdiction to issue a writ of mandamus as is requested by plaintiffs. Rule 81(b), Federal Rules of Civil Procedure; Youngblood v. United States, 141 F. 2d 912 (C.A. 6th).

This suit in equity cannot be maintained as plaintiffs have a plain and adequate remedy at law. Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 (C.A. 6th); Ohio State Nurses Ass'n v. Busey, 120 F. 2d 11 (C.A. 6th); Larson v. House, 112 F. 2d 930 (C.A. 5th); 28 U.S.C. Sec. 1346(a)(1); Sec. 6343, Internal Revenue Code, 1954; Treasury Regulations on Procedure and Administration (1954 Code), Sec. 301.6343-1.

(s) J. Leonard Walker,
United States Attorney,
Attorney for Defendants.

CERTIFICATE OF SERVICE.

I, J. Leonard Walker, United States Attorney for the Western District of Kentucky, certify that on the 15th day of October, 1956, I served the foregoing Motion to Dismiss by placing a copy thereof in a franked envelope addressed to Robert Hubbard, plaintiff herein, at 501 Kentucky Home Life Building, Louisville, Kentucky, his last known address, and depositing same in the United States mails at Louisville, Kentucky.

(s) J. Leonard Walker.

United States of America }
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Dismiss in the Matter of Civil Action No. 3216, Robert Hubbard, Lavinia Hubbard, his wife v. Russell C. Harrington, Commissioner of Internal Revenue, N. B. Eshleman, Regional Commissioner of Internal Revenue, William, District Director of Internal Revenue, District of Kentucky, filed October 15, 1956, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 31st day of July, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "D".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Louisville Division
Civil Action No. 3216.

Robert Hubbard,
Lavina Hubbard, His Wife, - - - - Plaintiffs,

v.

William M. Gray, - - - - - - Defendant.

AMENDED COMPLAINT—Filed December 6, 1956.

Come Plaintiffs, and by leave of Court, amend the third literary paragraph of their Complaint, and for said amendment plaintiff, Robert Hubbard, states that his books and financial statements, and the financial statements of his wife, his co-plaintiff, Lavina Hubbard, showing the assets and liabilities of each of them, have always been open for examination and inspection by any duly accredited representative of the Internal Revenue Department; that their books of income and expenditures, and all their records, have, at all times, been open to inspection to the duly accredited representatives of the Income Tax Department; that the defendant, his representatives and deputies never, at any time, before said defendant assessed the penalties against these plaintiffs in this action, made any attempt whatsoever to ascertain whether said plaintiffs' failure, if any there was, to file declarations of estimated tax, or to pay any tax on time, was due to reasonable cause, on the part of the plaintiffs, nor did the defendant or his representatives undertake to ascertain that said failure, if any

there was, on the part of these plaintiffs, was due to willful misconduct on their part or on the part of either of them, and that said defendant, and his representatives, had absolutely no evidence whatsoever, much less competent evidence, to arbitrarily assess penalties involved in this action against these plaintiffs for alleged failure to file estimated tax, or to pay said taxes on time. Plaintiffs further state that said defendant, and his representatives, illegally contrary to Section 294, Subsection (d), Subsection (1), Subsection (A), and Subsection (B), arbitrarily, without any notice whatsoever, and without giving these plaintiffs an opportunity to be heard, and without any competent, or any evidence, assessed against these plaintiffs the alleged penalties involved, and is now attempting to collect by distraint.

Wherefore, plaintiffs pray as in their original Complaint.

(s) Robert Hubbard.
(s) Robert Hubbard,
Attorney for Lavinia Hubbard.

Plaintiff, Robert Hubbard, says that the foregoing statements are true.

(s) Robert Hubbard.

Subscribed and sworn to before me by Robert Hubbard, this 6th day of December, 1956.

My commission expires June 24, 1957.

(s) F. L. Pearl,
Notary Public, Jefferson County,
Kentucky.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Amended Complaint in the Matter of Civil Action No. 3216, Robert Hubbard, Lavina Hubbard, his wife, vs. William M. Gray, filed December 6, 1956, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 31st day of July, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "E".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Louisville Division
Civil Action No. 3216.

Robert Hubbard,
Lavina Hubbard, His Wife, - - - - - Plaintiffs,

v.

William M. Gray, District Director of Internal Revenue, District of Kentucky, and
United States Government, - - - Defendants.

Serve Hon. Leonard Walker
U. S. District Attorney
for the Western District
of Kentucky
Serve Hon. Herbert Brownell, Jr.
U. S. Attorney General
Washington, D. C.

SECOND AMENDED COMPLAINT—Filed December 17, 1956.

Come plaintiffs herein and reiterate and reaffirm each and every allegation in their original Complaint, except the allegations pertaining to Russell C. Harrington and N. B. Eshleman, and they reaffirm each and every allegation of their Amended Complaint, and by leave of the Court they further amend their Complaint and make the United States Government a party defendant, and file herewith and attach hereto an exact copy of their original Complaint, and by

reference make it a part of this Second Amended Complaint, the same as if incorporated herein, marked "Exhibit A", and they file herewith an exact copy of their Amended Complaint, and by reference make it a part of this Amended Complaint, the same as if incorporated herein, marked "Exhibit B".

Wherefore, plaintiffs pray:

1. That the United States Government be summoned.

2. That the defendants and each of them be ordered and directed to release the levy of $240.52 or any sum against the plaintiff, Robert Hubbard's bank account in Citizens Fidelity Bank and Trust Company.

3. That the defendants and each of them be restrained and enjoined from collecting the penalties assessed against these plaintiffs.

(s) Robert Hubbard.
(s) Robert Hubbard,
Attorney for Lavina Hubbard.

Plaintiff, Robert Hubbard, says that the foregoing statements are true.

(s) Robert Hubbard.

Subscribed and sworn to before me by Robert Hubbard, this 13th day of December, 1956.

My commission expires June 24, 1957.

(s) F. L. Pearl,
Notary Public, Jefferson County,
Kentucky.

Copy received
Dec. 17, 1956—Charles M. Allen, Ass't U. S. Att'y.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Second Amended Complaint in the Matter of Civil Action No. 3216, Robert Hubbard, Lavina Hubbard, his wife, vs. William M. Gray, District Director of Internal Revenue, District of Kentucky, and United States Government, filed December 17, 1956, without Exhibits A and B, now remaining among the record of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 8th day of August, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "F".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Louisville Division
Civil Action No. 3216.

Robert Hubbard,
Lavina Hubbard, His Wife, - - - - - Plaintiffs,

v.

William M. Gray, District Director of Internal Revenue, District of Kentucky, and
United States, - - - - - - - Defendants.

MOTION TO DISMISS SECOND AMENDED COMPLAINT—Filed December 27, 1956.

William M. Gray, District Director of Internal Revenue, and the United States the above named defendants, by J. Leonard Walker, United States Attorney for the Western District of Kentucky, respectfully move the Court pursuant to Rule 12 of the Federal Rules of Civil Procedure as follows:

To dismiss the above-entitled action against each and all of the above named defendants because the complaint fails to state a claim upon which relief can be granted and because it appears on the face of the complaint that the Court lacks jurisdiction over the subject matter on the following grounds:

Since the court is specifically forbidden by legislative mandate to enjoin the administrative collection of federal taxes, it has no jurisdiction to grant such relief. Section 7421(a), Internal Revenue Code, 1954; Dyer v.

Gallagher, 203 F. 2d 477 (C.A. 6th); Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 (C. A. 6th); Ohio State Nurses Ass'n. v. Busey, 120 F. 2d 11 (C. A. 6th).

In actions seeking an injunction to restrain the collection of a civil penalty provided for under the Internal Revenue Code, the prohibition of Section 7421(a) is equally applicable. Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 (C.A. 6th); Helvering v. Mitchell, 303 U. S. 391; Headley v. Knox, 133 F. Supp. 36 (Minn.).

This Court lacks jurisdiction to issue a writ of mandamus as is requested by plaintiffs: Rule 81(b), Federal Rules of Civil Procedure; Youngblood v. United States, 141 F. 2d 912 (C.A. 6th).

This suit in equity cannot be maintained as plaintiffs have a plain and adequate remedy at law. Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 (C.A. 6th); Ohio State Nurses Ass'n v. Busey, 120 F. 2d 11 (C.A. 6th); Larson v. House, 112 F. 2d 930 (C.A. 5th); 28 U.S.C., Sec. 1346(a)(1); Sec. 6343, Internal Revenue Code, 1954; Treasury Regulations on Procedure and Administration (1954 Code), Sec. 301.6343-1.

(s) J. Leonard Walker,
United States Attorney,
Attorney for Defendants.

CERTIFICATE OF SERVICE.

I, J. Leonard Walker, United States Attorney for the Western District of Kentucky, certify that on the 27th day of December, 1956, I served the foregoing Motion to Dismiss Second Amended Complaint by placing a copy thereof in a franked envelope, addressed to Robert Hubbard, plaintiff herein, at 501 Kentucky Home Life Building, Louisville, Kentucky, his last known address, and depositing same in the United States mails at Louisville, Kentucky.

(s) J. Leonard Walker.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Dismiss Second Amended Complaint in the Matter of Civil Action No. 3216, Robert Hubbard, Lavina Hubbard, his wife, vs. William M. Gray, Districtor of Internal Revenue, District of Kentucky, and United States, filed December 27, 1956, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 31st day of July, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "G".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Louisville Division
Civil Action No. 3216.

Robert Hubbard,
Lavinia Hubbard, His Wife, - - - - Plaintiffs,

v.

William M. Gray, District Director of Internal Revenue, District of Kentucky, and United States Government, - - - Defendants.

THIRD AMENDED COMPLAINT—Tendered January 24, 1957; Filed January 29, 1957.

Come plaintiffs, and by reference make the original, Amended and Second Amended Complaints, except the allegations pertaining to Russell C. Harrington and N. B. Eshleman, a part of this Third Amended Complaint, the same as if incorporated herein, marked "Exihibts A", "B", "C", and by leave of Court under Rule 15A they further amend their Complaint, and for said further Amendment they state that U.S.C.A. Title 28, Section 294 (d), (1), (A), and (B) in force in 1953, by which the defendant, the Collector, attempts to distrain the penalties heretofore mentioned in the pleadings, insofar as said section gives power to the Commissioner or Collector to assess penalties according to his own whim or caprice, that is, his satisfaction, is contrary to the Fifth Amendment of the Constitution of the United States, in that it permits him to

distrain and take plaintiffs' property and money, without due process of law, that is, it permits him to take, distrain and appropriate these plaintiffs' money without notice or an opportunity to be heard, which is, without due process of law, contrary to the above section of the Constitution of the United States, and void.

Wherefore, plaintiffs pray as in their original and amended complaints, and they further pray that said Section 294 (d), (1), (A), and (B) of Title 26 of U.S.C.A. be held contrary to the Fifth Amendment of the Constitution of the United States and void.

(s) Robert Hubbard,
(s) Robert Hubbard,
Attorney for Lavinia Hubbard.

Plaintiff, Robert Hubbard, says that the foregoing statements are true.

(s) Robert Hubbard.

Subscribed and sworn to before me by Robert Hubbard, this 24th day of January, 1957.

My commission expires the 24 day of June, 1957.

(s) Ralph A. Stone,
Notary Public, Jefferson County, Ky.

January 24, 1957.
2 copies received.

Leonard Walker, District Attorney,
By (s) Charles M. Allen, Ass't U. S. Atty.,
Attorneys for Defendants.
Notice of filing waived and filing objected to.

(s) Charles M. Allen, Ass't U. S. Atty.

United States of America }
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Third Amended Complaint in the Matter of Robert Hubbard, Lavinia Hubbard, his wife vs. William M. Gray, District Director of Internal Revenue, District of Kentucky, and United States Government, filed January 29, 1957, without Exhibits A, B and C, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 8th day of August, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "H".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Louisville Division
Civil Action No. 3216.

Robert Hubbard,
Lavinia Hubbard, His Wife, - - - - Plaintiffs,

v.

William M. Gray, District Director of Internal Revenue, District of Kentucky, and
United States Government, - - - Defendants.

AMENDMENT TO PRAYER OF THIRD AMENDED COMPLAINT—Tendered February 6, 1957.

Come plaintiffs, and by leave of Court under Rule 15A amend their prayer to the Third Amended Complaint, and for said Amendment to said prayer they further pray for a three judge Court to decide the issue raised in the Third Amended Complaint.

(s) Robert Hubbard.
(s) Robert Hubbard,
Attorney for Lavinia Hubbard.

February 5, 1957.

I hereby certify that I have mailed two true copies of the above Amendment to Prayer of Third Amended Complaint to the Honorable Charles M. Allen, Assistant District Attorney, Federal Bldg., Louisville 1, Ky.

(s) Robert Hubbard.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Amendment to Prayer of Third Amended Complaint in the Matter of Civil Action No. 3216, Robert Hubbard, Lavinia Hubbard, his wife, vs. William M. Gray, District Director of Internal Revenue, District of Kentucky, and United States Government, tendered February 6, 1957, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 31st day of July, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "I".

UNITED STATES DISTRICT COURT
Western District of Kentucky
At Louisville
Civil Action No. 3216.

Robert Hubbard, et ux., - - - - - Plaintiffs,

v.

William M. Gray, District Director, Internal Revenue Service, and
The United States Government, - - Defendants.

MOTION TO DISMISS THIRD AMENDED COMPLAINT

—Filed February 15, 1957.

Come now the defendants, by counsel, and move the Court to dismiss the Third Amended Complaint filed herein by the plaintiffs. In support of said motion, defendants reiterate each and every allegation contained in their motion to dismiss directed to the Second Amended Complaint, and make same a part hereof as fully as if copied herein.

Wherefore, the defendants pray that the complaint, amended complaint, second amended complaint and third amended complaint of the plaintiffs herein be dismissed.

Dated this 15th day of February, 1957.

United States of America,
J. Leonard Walker,
United States Attorney,
(s) Charles M. Allen,
Assistant United States Attorney.

CERTIFICATE OF SERVICE.

I, Charles M. Allen, Assistant United States Attorney for the Western District of Kentucky, certify that I served the above motion to dismiss on the 15th day of February, 1957, by placing a copy of same in a franked envelope, addressed to Robert Hubbard, plaintiff and attorney for plaintiffs, at Kentucky Home Life Building, Louisville, Kentucky, his last known address, and depositing same in the United States mails at Louisville, Kentucky.

(s) Charles M. Allen.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky do hereby certify that the annexed and foregoing is a true and full copy of the original Motion to Dismiss Third Amended Complaint in the Matter of Civil Action No. 3216, Robert Hubbard, et ux., vs. William M. Gray, District Director, Internal Revenue Service and The United States Government, filed February 15, 1957, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 31st day of July, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "J".

In the
UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville
Civil No. 3216.

Robert Hubbard,
Lavinia Hubbard, His Wife, - - - - Plaintiffs,

v.

William M. Gray, District Director of Internal Revenue, District of Kentucky, and
United States of America, - - - Defendants.

ORDER—Entered July 3, 1957.

This case is before the Court on the defendants' motion to dismiss the complaint. The action was filed by the plaintiffs against the Director of Internal Revenue to restrain the collection of a deficiency assessed against them for failure to pay installments of estimated income tax for the year 1953 when they were due as provided by Section 294(d) of the 1939 Internal Revenue Code.

The exhibits filed in the record disclose that the Director fully complied with Section 272(a)(c) of the Revenue Code of 1939 in assessing and notifying the plaintiffs of their deficiency. A notice of deficiency was sent to the taxpayers by registered mail, and after the expiration of the 90-day period, the plaintiffs having failed to file a petition with the Tax Court of the United States for a re-examination of the deficiency, proceedings to collect the tax deficiency of $231.50 were initiated and the plaintiffs' bank account was attached.

The plaintiffs' contentions, if established, that it would have been a financial hardship to pay the tax when due; that the tax was arbitrarily assessed against them; and that Sections 294(d)(1)(A) and (B) of the Internal Revenue Code are unconstitutional would not justify the relief they seek.

Section 7421(a) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The exception to the plain wording of this section is where special and extraordinary circumstances are present justifying equitable relief. Miller v. Standard Nut Margarine Co., 284 U. S. 408; Dyer v. Gallagher, 203 F. 2d 477 (6 Cir.). Hardship in raising money with which to pay taxes is not an extraordinary circumstance that will justify injunctive relief. Reams v. Vrooman-Fehn Printing Co., 140 F. 2d 237 (6 Cir.); Long v. Gray, 130 F. Supp. 194 (Ky.); Jewel Shop of Abbeville v. Pitts, 218 F. 2d 692; Kaus v. Huston, 120 F. 2d 183. The fact that a taxpayer does not owe a tax that has been illegally and arbitrarily assessed likewise is not a special circumstance permitting the issuance of an injunction against collection. Jewel Shop of Abbeville v. Pitts, supra; Milliken v. Gill, 211 F. 2d 869. It is also well established that alleged unconstitutionality of the taxing statute is not sufficient defense to justify injunctive relief. Dodge v. Osborn, 240 U. S. 118; Bailey v. George, 259 U. S. 16; Dyer v. Gallagher, supra; Reams v. Vrooman-Fehn Printing Co., supra.

The plaintiffs further request that a three-judge court be convened because of the alleged unconstitutionality of the taxing statute. Since for the reasons given above a substantial federal question is not presented by the complaint, a three-judge court cannot be convened. California Water Service Co. v. Redding, 304 U. S. 252; Ex Parte Poresky, 290 U. S. 30.

This case is an ordinary case of a deficiency assessment against the plaintiffs for failure to properly return and file their taxes, and collection of the deficiency cannot be enjoined, as extraordinary and exceptional circumstances warranting an exception to the specific wording of Section 7421(a) do not exist.

It Is Therefore Ordered that the motion of the defendants to dismiss the complaint be and it is sustained.

(s) Henry L. Brooks,
United States District Judge.

Plaintiff:
Mr. Robert Hubbard
501 Kentucky Home Life Bldg.

Copy mailed
7-3-57

For the Defendants:
Mr. J. Leonard Walker,
United States Attorney.

Copy delivered
7-3-57
L I N

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original order dated July 3, 1957, signed by Honorable Henry L. Brooks, U. S. District Judge, in the Matter of Civil No. 3216 Robert Hubbard, Lavinia Hubbard, his wife v. William M. Gray, District Director of Internal Revenue, District of Kentucky, and United States of America, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 31st day of July, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "K".

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
Louisville Division

Civil Action No. 3216

Robert Hubbard,
Lavinia Hubbard, His Wife, - - - - - Plaintiffs,

v.

William M. Gray, District Director of Internal Revenue, - - - - - - - - Defendants.

MOTION UNDER RULE 59 (a) AND (e) TO VACATE AND SET ASIDE AND/OR ALTER OR AMEND THE ORDER OR JUDGMENT OF JULY 3, 1957— Filed July 12, 1957.

Come Plaintiffs, under Rule 59(a) and (e), and move the Court to vacate and set aside and or to alter and amend the Order or Judgment entered herein on July 3, 1957, on the grounds, to-wit:

1. That the alleged deficiency assessed by the Defendant is a penalty pure and simple, and as such this Court not only has the authority to enjoin the Defendant, but it is his duty to do so. For example, Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822; Lipke v. Lederer, 259 U. S. 557, 42 S. Ct. 549, 66 L. Ed. 1061; Regal Drug Corporation v. Wardell, 260 U. S. 386, 43 S. Ct. 152, 67 L. Ed. 318; Allen v. Regents of the University of Georgia, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448.

In Denton, et al. v. City of Carrollton, et al., 235 Fed. 2d 481, of the Fifth Circuit Court of Appeals, the Court on page 485 said:

"To require the payment of any such sum as a condition to testing the validity of the exaction, if it does not of itself make the tax illegal for that reason, at least presents such a heavy burden that to decline equitable relief would be to deny judicial review altogether, Ex parte Young, 209 U. S. 123, 144, 28 S. Ct. 441, 52 L. Ed. 714, 722; Missouri Pacific Railway Co. v. Tucker, 230 U. S. 340, 35 S. Ct. 961, 57 L. Ed. 1507; Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255; Beal v. Missouri Pacific R. Co., 312 U. S. 45, 61 S. Ct. 418, 85 L. Ed. 577. Indeed, in such a setting, where the so-called tax has clearly punitive qualities, it may, if invalid, be enjoined, Regal Drug Co. v. Wardell, 260 U. S. 386, 43 S. Ct. 152, 67 L. Ed. 318; United States v. LaFranca, 282 U. S. 568, 51 S. Ct. 278, 75 L. Ed. 551; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78; Union Pacific R. Co. v. Board of Commissioners of Weld County, 247 U. S. 282, 38 S. Ct. 510, 62 L. Ed. 1110; Lee v. Bickell, 292 U. S. 415, 54 S. Ct. 727, 78 L. Ed. 1337; and see Allen v. Regents of University of Georgia, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448; Miller v. Standard Nut Margarine Co., 284 U. S. 498, 52 S. Ct. 260, 76 L. Ed. 422; Georgia Railroad & Banking Co. v. Redwine, 342 U. S. 299, 72 S. Ct. 321, 96 L. Ed. 335; Toomer v. Witsell, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460.

"The large amount of money required to pre-pay for a test becomes an aggravated factor if actual doubt exists concerning the recoverability of such sums in the event the basic law is ultimately declared invalid. That doubt both eliminates the statutory prohibition against enjoining state tax collections and is a basis for apprehension of genuine and irretrievable loss. Union Pacific R. Co. v. Board of Com'rs of Weld County, supra; Raymond v. Chicago Union Traction Co., supra; Georgia Railroad & Banking Co. v. Redwine, supra; Fox v. Standard Oil Co., 294 U. S. 87, 55 S. Ct. 333,

79 L. Ed. 780; Graves v. Texas Co., 298 U. S. 393, 56 S. Ct. 818, 80 L. Ed. 1236; Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638; Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413, 43 S. Ct. 620, 67 L. Ed. 1051."

See also Midwest Haulers, Inc., et al. v. Grady, 128 Fed. 2d 496, 6th Cir. Ct. of Appeals, rendered by Judge Hamilton; John M. Hurst & Co. v. Gentesch, 133 Fed. 2d 247, Sixth Circuit Court of Appeals.

Hence the Court committed a prejudicial and reversible error in denying Plaintiff's Complaint and Amended Complaints for an injunction, and should grant the plaintiffs a new trial and grant the injunction.

2. In the second place, the Court prejudicially erred in overruling Plaintiff's Third Amended Complaint to have a three-judge Court decision on the constitutional question clearly and definitely raised by Plaintiffs in their said Third Amended Complaint. Contrary to the Court's Order or opinion of July 3, 1957, this Third Amended Complaint of Plaintiffs clearly and definitely raises and presents a substantial Federal question—namely, due process of law under the Fifth Amendment to the Constitution of the United States.

On page 3 of his Order or Judgment of July 3, 1957, the Court says:

"Since for reasons given above a substantial Federal question is not presented by the Complaint, a three-judge Court cannot be convened. California Water Service Company v. Redding, 304 U. S. 252; Ex Parte Poresky, 290 U. S. 30." Those cases clearly state the principal of law, but the facts clearly distinguish them from the case at bar. In each of those cases it was sought to enjoin the enforcement of State Statutes wherein no Federal question was raised or could be raised.

We most respectfully invite the Court's attention to the case of Ex Parte Cogdell, et al., 342 U. S. 163, 72 S. Ct. 196.

The Supreme Court of the United States in Walker v. The City of Hutcherson, 77 S. Ct. p. 200, at p. 202 (decided December 10, 1956), said:

> "It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. THE RIGHT TO A HEARING IS MEANINGLESS WITHOUT NOTICE."

In the case at bar Plaintiffs had no notice of assessment of the alleged penalties or deficiency until they had been assessed; they had no notice. Furthermore, the section of the Code under which they were assessed grants the power and authority to a ministerial officer to assess them without notice, which we most earnestly and respectfully insist is contrary to the due process law, the Fifth Amendment to the Constitution of the United States.

(s) Robert Hubbard,
Plaintiff & Atty.

July 12, 1957.
Received two copies of above Motion.

(s) Charles M. Allen,
Assistant District Attorney.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Motion Under Rule 59 (a) and (e) to Vacate and Set Aside and/or Alter or Amend the Order or Judgment of July 3, 1957, in the Matter of Civil Action No. 3216, Robert Hubbard, Lavinia Hubbard, his wife v. William M. Gray, District Director of Internal Revenue, filed July 12, 1957, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 31st day of July, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

EXHIBIT "L".

In the
UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville
Civil No. 3216.

Robert Hubbard,
Lavinia Hubbard, His Wife, - - - - - Plaintiffs,

v.

William M. Gray, District Director of Internal Revenue, District of Kentucky, and
United States of America, - - - - Defendants.

ORDER—Entered July 22, 1957.

The plaintiffs have filed a motion for a new trial pursuant to Rule 59(a)(2) of the Federal Rules of Civil Procedure. The grounds advanced in support of this motion are repetitious of arguments previously made at the trial of this case. There is no showing that the judgment entered is based on a manifest misapprehension of the law or a mistake of fact. Solar Laboratories v. Cincinnati Advertising Products Co., 34 F. Supp. 783; Appeal dismissed, 116 F. 2d 497 (6 Cir.).

It Is Therefore Ordered that plaintiffs' motion be and it is denied.

(s) Henry L. Brooks,
United States District Judge.

cc:
Mr. Robert Hubbard,
501 Kentucky Home Life Building,
Mr. J. Leonard Walker,
United States Attorney.
Copies sent 7-22-57.

United States of America
Western District of Kentucky } ss:

I, Martin R. Glenn, Clerk of the United States District Court for the Western District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Order signed by Honorable Henry L. Brooks, United States District Judge, on July 22, 1957, in the matter of Civil Action No. 3216, Robert Hubbard, Lavinia Hubbard, his wife, v. William M. Gray, District Director of Internal Revenue, District of Kentucky, and United States of America, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Louisville, Ky., this 8th day of August, A. D. 1957.

Martin R. Glenn, Clerk,
By (s) Loraine Miller,
Deputy Clerk.

(Seal)

Office - Supreme Court, U.S.
FILED
OCT 9 1957
JOHN T. FEY, Clerk

No. 194 Misc.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

ROBERT HUBBARD and
LAVINIA HUBBARD, His Wife, - - Petitioners,

vs.

HENRY L. BROOKS, United States District Judge for the Western District of Kentucky, - - - - - - - - Respondent.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

ROBERT HUBBARD and
LAVINIA HUBBARD, His Wife,
Petitioners.
Kentucky Home Life Building,
Louisville 2, Kentucky.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 194 Misc.

ROBERT HUBBARD and
LAVINIA HUBBARD, His Wife, - - *Petitioners,*

v.

HENRY L. BROOKS, United States District Judge for the Western District of Kentucky, - - - - - Respondent.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

May it please the Court:

Though lengthy, though containing some matter, at first brush, seemingly irrelevant and immaterial, yet we again very earnestly and most respectfully request the Court, and each member thereof, to carefully and thoughtfully read and consider our petition in its entirety.

For reply to "Memorandum for The United States in Opposition", we boldly and emphatically, but very respectfully, deny: (1) that our petition is premature; see Paragraph 9-a, pages 14-18 of our Petition, and especially ex parte Peru, 318 U. S. 578, 63 S. Ct. 793, 87 L. Ed. 1014. Stratton v. St. Louis Southwestern Railway Co., 282 U. S. 10, 16, 51 S. Ct. 465, 75 L. Ed. 135, cited by the Solicitor General, Honorable J. Lee Rankin, supports Petitioners, for in that case this Court said: "Accordingly, where a Court of three judges should have been convened, and was not, this Court may issue a Writ of Mandamus to vacate the Order for Decree entered by the District Judge," etc.;

(2) Deny that our petition does not present a substantial Federal Constitutional question; but most respectfully assert that it does present a very, very substantial constitutional question, and Petitioners, under U. S. C., Section 1651-a (see page 5 of their Petition), and Rule 32 (3) of this Court have a right to make their Motion and file their Petition direct to this Court. See Paragraphs Nos. 3 and 4, pages 2-6, Paragraph No. 6, pages 6-9, Paragraph 9-A, pages 14-18, Paragraphs 9-D (4) (5) (6) and (7), pages 29-46 of their Petition and authorities cited therein. The Constitutional issue raised by their Petition most certainly involves "*a question of urgent and overriding public importance*" or "*the question is of such a nature that it is peculiarly appropriate that such an action should be taken.*" The question involved in the instant case is whether or not it is contrary to the Fifth Amendment of the Constitution of the United States

to permit, *without notice or hearing, ministerial officers of the Department of Revenue to assess PENALTIES, not deficiency taxes, on income taxpayers. Every income taxpayer—there are literally millions of us—is affected thereby, hence Petitioners raise a very substantial constitutional issue.* We respectfully maintain that the facts and issues in Wicks v. Southern Pacific Company, 231 Fed. 2d 130, cited by the Solicitor General, are materially, substantially and clearly different from the facts in and issues involved in the instant case;

(3) Deny that Sections 272 (a) and (c) of the Internal Revenue Code of 1939 provide adequate notice and hearing within the requirements of due process clause of the Fifth Amendment. See our Petition, pages 29 through 45, and the authorities therein cited. Phillips v. Commissioner, 283 U. S. 589, 597-600, 51 S. Ct. 608, 75 L. Ed. 1289, cited by the Solicitor General has no application, and is clearly distinguishable from the instant case, *because in that case no question of penalties or the imposition of penalties without notice or hearing was involved. In that case the Commissioner assessed deficiency taxes—not PENALTIES, and distrained for the deficiency.* Certainly the Commissioner, without any violation of constitutional rights, has a right to assess deficiency taxes and distrain for their collection.

(4) Deny that the Statute which prohibits a taxpayer from enjoining a Collector from assessing and collecting penalties has any application to the case at bar. See Paragraph 9-D (2), pages 24-29 of our Petition; Helvering v. Mitchell, 303 U. S. 391, 58 S. Ct. 630,

has no application to the instant case, for in that case no question of penalties was involved.

(5) They deny that Petitioners have an adequate remedy at law where penalties are involved. In Allen, Collector v. Regents University System of Georgia, 304 U. S. 439, 58 S. Ct. 980, 82 L. Ed. 1448, this Court said:

> "What we have said indicated that Rev. Stat. Section 3224, *supra*, does not oust the jurisdiction. *The statute is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent, but of a PENALTY* for the failure to collect it from another."

Petitioners present the same situation in the case at bar that was before this Court in Allen, Collector *supra*.

For reasons set forth in our original Petition, and hereinabove set forth, we most respectfully submit that the Petitioners, and every income tax payer in the United States is affected, and that they are entitled to relief sought.

Respectfully submitted,

ROBERT HUBBARD and
LAVINIA HUBBARD,
Ky. Home Life Bldg.,
Louisville 2, Ky.,
Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 194 Misc.

ROBERT HUBBARD AND LAVINIA HUBBARD, HIS WIFE, PETITIONERS

v.

HENRY L. BROOKS, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF KENTUCKY

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

On April 26, 1955, the District Director of Internal Revenue at Louisville, Kentucky, notified Robert and Lavinia Hubbard (hereinafter called taxpayers) that an examination of their tax return for the year 1953 disclosed that an addition to tax, in the amount of $119.79, was due for failure to file a declaration of estimated tax on time or for failure to pay installments when due, pursuant to Section 294 (d) (1) (A) and (B) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 294 (d)). (Pet. 58–62.) On

May 18, 1955, the District Director similarly notified taxpayers that the amount due for the addition to tax had been corrected to $231.57. (Pet. 63–67.) Thereafter, in compliance with Section 272 (a) and (c) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 272 (a) and (c)), the District Director sent a statutory notice of deficiency by registered mail to the taxpayers.[1] The taxpayers did not file a petition in the Tax Court of the United States for a redetermination of the deficiency and, after the expiration of the ninety-day period provided by the statute, the addition to tax was assessed and collection proceedings were initiated, the taxpayers' bank account being attached. (Pet. 94.)

Taxpayers then filed a complaint in the United States District Court for the Western District of Kentucky, seeking an injunction restraining the collection of the amount assessed. (Pet. 69–72.) A motion to dismiss the complaint was filed, contending (1) that the complaint failed to state a claim upon which relief could be granted, and (2) that it appeared on the face of the complaint that the court lacked jurisdiction because the court was specifically

[1] It was stipulated (Pet. 57) that the exhibits attached to the stipulation filed in the District Court were the notices and correspondence between taxpayers and the District Director. Taxpayers printed the stipulation and certain of the exhibits in the appendix to their petition (Pet. 57–68). Copies of the remaining exhibits, including the statutory notices of deficiency, are submitted herewith. This stipulation, and the exhibits attached thereto, clearly support the District Court's finding (Pet. 94) that the District Director fully complied with the provisions of Section 272 (a) and (c) of the 1939 Code.

forbidden, by Section 7421 (a) of the Internal Revenue Code of 1954, to enjoin the administrative collection of federal taxes or additions to tax, and because the taxpayers had an adequate remedy at law. (Pet. 74–76, 84–85.) Taxpayers then filed a third amended complaint (Pet. 87–88),[2] which alleged that Section 294 (d) (1) (A) and (B) of the Internal Revenue Code of 1939 (which provides the statutory authority for the addition to tax involved herein) is contrary to the due process clause of the Fifth Amendment to the Constitution of the United States. Taxpayers further amended the third amended complaint (Pet. 90), asking that a three-judge court be convened to decide this issue. A similar motion to dismiss the third amended complaint was filed. (Pet. 92–93.)

The District Court, in an order entered July 3, 1957, sustained the motion to dismiss, holding that the taxpayers' contentions, if established, did not present any special and extraordinary circumstances which would justify equitable relief. The court also refused to convene a three-judge court, finding that no substantial federal question was presented. (Pet. 94–96). Taxpayers filed a motion to vacate and set aside and or alter or amend this order (Pet. 97–100). This motion was denied on July 22, 1957 (Pet. 102).

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[2] The original complaint (Pet. 69–72) had named the Commissioner, Regional Commissioner, and District Director of Internal Revenue as defendants. A first amended complaint (Pet. 78–79) was filed, amending certain allegations, and a second amended complaint (Pet. 81–82) was filed, voluntarily dismissing the action against the Commissioner and Regional Commissioner, and naming the United States as defendant.

On September 5, 1957, taxpayers, without first seeking review by the United States Court of Appeals for the Sixth Circuit, filed the instant motion for leave to file a petition for a writ of mandamus ordering the Honorable Henry L. Brooks, United States District Judge for the Western District of Kentucky, to revoke the orders of July 3, and July 22, 1957, and to convene a three-judge court to hear the constitutional question raised.

DISCUSSION

From the foregoing facts, it is clear that the order of the District Court refusing to convene a three-judge court and, in addition, dismissing the complaint, was correct and that taxpayers' motion for leave to file a petition for a writ of mandamus should be denied.

At the outset, it is submitted that the taxpayers' motion is premature. The remedy of a writ of mandamus directing the convening of a three-judge court is not available where there is a remedy by way of appeal. *Stratton v. St. Louis Southwestern Railway Co.*, 282 U. S. 10, 16. Where a district judge, as here, finds that no substantial constitutional issue is presented by the complaint and refuses to convene a three-judge court,[1] his decision is subject to review by

[1] It is the duty of a district judge, to whom application has been made for an injunction restraining the enforcement of a federal statute on the grounds of constitutional invalidity, to scrutinize the complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable. *California Water Service Co. v. Redding*, 304 U. S. 252, 254–255.

the appropriate Court of Appeals. *Wicks* v. *Southern Pacific Co.*, 231 F. 2d. 130 (C. A. 9th), certiorari denied, 351 U. S. 946.* Accordingly, the instant motion should be denied.

Moreover, it is apparent that no substantial federal question is presented and that the District Court was correct in so holding. An amount determined as a penalty under Section 294 (d) of the Internal Revenue Code of 1939 can, by itself, give rise to a deficiency as defined in Section 271 of the 1939 Code, and is properly assessed by the means provided in Section 272 of the 1939 Code. *Newsom* v. *Commissioner*, 22 T. C. 225, affirmed *per curiam*, 219 F. 2d 444 (C. A. 5th); *Davis* v. *Dudley*, 124 F. Supp. 426 (W. D. Pa.). Cf. *United States* v. *Erie Forge Co.*, 191 F. 2d 627 (C. A. 3d). Section 272 (a) and (c) of the Internal Revenue Code of 1939, with which the District Director fully complied in this case, clearly provides for adequate notice and hearing within the requirements of the due process clause of the Fifth Amendment, and is plainly valid. Cf. *Phillips* v. *Commissioner*, 283 U. S. 589, 597-600.

In addition, it might be noted that the initial and basic relief sought by the taxpayers (i. e., an injunc-

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*This Court will exercise its discretion to issue a writ directly to a federal district court where appeal to an intermediate court would otherwise be available only in exceptional cases, i. e., where a question of urgent and overriding public importance is involved or where the question is of such a nature that it is peculiarly appropriate that such action should be taken. *Ex Parte Peru*, 318 U. S. 578. It is clear from the face of the petition that this case presents no such question, and is not of such exceptional character as to call invocation of any extraordinary remedies.

tion restraining the collection of the properly assessed addition to tax) is prohibited by statute. The addition to tax provided by Section 294 (d) of the 1939 Code is remedial, not penal (Cf. *Helvering* v. *Mitchell,* 303 U. S. 391), and the collection thereof cannot be enjoined in the absence of special and extraordinary circumstances. See *Miller* v. *Standard Nut Margarine Co.,* 284 U. S. 498, 509–510; *McDowell* v. *Heiner,* 9 F. 2d 120 (W. D. Pa.), affirmed *per curiam,* 15 F. 2d 1015 (C. A. 3d), certiorari denied, 273 U. S. 759; *Kohlhamer* v. *Smietanka,* 239 Fed. 408 (N. D. Ill.). Such circumstances not being presented here, the District Court was without jurisdiction, and the complaint was properly dismissed on this ground.

CONCLUSION

It is submitted that the petition for a writ of mandamus, in addition to being prematurely brought in this Court, is, on its face, without merit, and the motion seeking leave to file the petition should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

OCTOBER 1957.

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